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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

18 Civ. 2921 (JMF)

6 UNITED STATES DEPARTMENT OF
7 COMMERCE, et al.,

Argument

8 Defendants.

9
10 -----x
11 NEW YORK IMMIGRATION
12 COALITION, et al.,

13 Plaintiffs,

14 v.

18 Civ. 5025 (JMF)

15 UNITED STATES DEPARTMENT OF
16 COMMERCE, et al.,

Argument

17 Defendants.

18 -----x
19
20 New York, N.Y.
21 July 3, 2018
22 9:30 a.m.

23 Before:

24 HON. JESSE M. FURMAN,

25 District Judge

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APPEARANCES

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(Case called)

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from New York for the state and local government plaintiffs.

One housekeeping matter, your Honor, if I may. The plaintiffs intended to have two lawyers oppose the Justice Department's motion to dismiss; Mr. Saini argue the standing argue and Ms. Goldstein argue the remaining 12(b)(1) and 12(b)(6) arguments; and then I will argue the discovery aspect of today's proceedings. And I may ask my cocounsel from Hidalgo County, Texas, Mr. Rios, to weigh in briefly on one particular aspect of expert discovery that we intend to proffer. So with the Court's indulgence, we may swap counsel in and out between those arguments.

THE COURT: Understood. Thank you.

MS. GOLDSTEIN: Elena Goldstein also from New York for the plaintiffs.

MR. SAINI: Ajay Saini also from New York for the plaintiffs.

MR. FREEDMAN: Good morning, your Honor.

John Freedman from Arnold & Porter for the New York Immigration Coalition plaintiffs.

MR. RIOS: Rolando Rios for the Cameron and Hidalgo County plaintiffs, your Honor.

MR. SHUMATE: Good morning, your Honor.

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1 Brett Shumate from the Department of Justice on behalf
2 of the United States. I'll be handling the motion to dismiss
3 augment today. My colleague, Ms. Vargas, will be handling the
4 discovery argument.

5 MS. VARGAS: Good morning, your Honor.

6 Jeannette Vargas with the U.S. Attorney's Office for
7 the Southern District of New York.

8 MS. BAILEY: Kate Bailey with the Department of
9 Justice on behalf of the United States.

10 MR. EHRLICH: Stephen Ehrlich from the Department of
11 Justice on behalf of defendants.

12 THE COURT: Good morning to everybody.

13 Just a reminder and request that everybody should
14 speak into the microphones. First of all, the acoustics in
15 this courtroom are a little bit subpar. Second of all we're
16 both on CourtCall so counsel who are not local can listen in
17 and also, I don't know if there are folks in the overflow room,
18 but in order for all of them to hear it's important that
19 everybody speak loudly, clearly, into the microphone.

20 Before we get to the oral argument a couple
21 housekeeping matters on my end. First, I did talk to judge
22 Seeborg following his conference I think it was last Thursday
23 in the California case. He mentioned that there is some new
24 cases since the initial conference in this matter, perhaps in
25 Maryland. Does somebody want to update me about that and tell

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me what the status of those cases may be.

MS. BAILEY: There is an additional case that's been filed in Maryland, Lupe v. Ross.

THE COURT: What was the plaintiff's name?

MS. BAILEY: Lupe. L-U-P-E. That case has just been filed and a schedule has not been set yet but it is before Judge Hazel, same as the case that was already filed in Maryland.

THE COURT: And that raises a citizenship question challenge?

MS. BAILEY: Yes, your Honor.

THE COURT: Are there any other cases aside from that?

MS. BAILEY: No, your Honor.

THE COURT: All right. Any objection to my potentially at some point reaching out to Judge Hazel?

MS. BAILEY: No, your Honor.

THE COURT: All right.

I have one minor disclosure, which is that there were a number of amicus briefs filed in this case, one of which was filed on behalf of several or a number of members of Congress, one of whom was Congresswoman Maloney. My 14-year-old daughter happened to intern for her primary campaign for about a week and two days earlier this month. I did consider whether I should either reject the amicus brief or if it would warrant anything beyond that, and I did not -- I decidedly did not;

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1 that disclosing it would suffice.

2 I should mention that my high school son is going to
3 be starting as a Senate Page next week. I don't think that's
4 affiliated with any particular senator but since several
5 senators were on that brief as well I figured I'd mention it,
6 but suffice it to say that their responsibilities are
7 commensurate with their ages. Don't tell them I said that.
8 They did not do anything in the census and will not.

9 All right. Finally, briefing in the New York
10 Immigration Coalition case is obviously continuing. The
11 government filed its brief last Friday. Plaintiffs will be
12 filing their opposition by July 9. And reply is due July 13.

13 Per my order of the 27th, June 27th that is, and
14 the plaintiffs' letter of June 29, I take it everybody's
15 understanding is that that briefing is going to focus on
16 arguments and issues specific to that case, and essentially the
17 government has already incorporated by reference its arguments,
18 to the extent they're applicable, from the states case and the
19 plaintiffs will not be responding separately to that.

20 MR. FREEDMAN: That's correct, your Honor.

21 THE COURT: And suffice it to say that my ruling in
22 the states case will apply to that case to the extent that
23 there are common issues.

24 Any other preliminary matters? Otherwise, I'm
25 prepared to jump into oral argument and we'll go from there.

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1 All right. So let's do it then. I think the best way
2 to proceed is I'm inclined to start with standing, then go
3 to -- folks should not be using that rear door but I'll let my
4 deputy take care of that.

5 Start with standing and then I'll hear first from
6 defendants as the moving parties and then plaintiffs can
7 respond. And then I want to take both the political question
8 doctrine and the APA justiciability together. I recognize that
9 there are discrete issues and arguments but, nevertheless,
10 there is some thematic overlap. And then, finally, I want to
11 take up the failure to state a claim under the enumeration
12 clause. Candidly, I want to focus primarily on that. So in
13 that regard I may move you a little quickly through the first
14 preliminary arguments.

15 So Mr. Shumate, let me start with you and focus on
16 standing in the first instance.

17 Use this microphone actually.

18 MR. SHUMATE: Good morning, your Honor. May it please
19 the Court, Brett Shumate for the United States.

20 Congress directed the Secretary of Commerce to conduct
21 the census in such form and content as he may determine. For
22 the 2020 census, Commerce decided to reinstate the question
23 about citizenship on the census questionnaire. That
24 questionnaire already asks a number of demographic questions
25 about race, Hispanic origin, and sex. As far back as 1820 and

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1 as most recently as 2000 Commerce asked a question about
2 citizenship on the census questionnaire.

3 THE COURT: Let me just make you cut to the chase
4 because I got the preliminaries, I've read the briefs, I'm
5 certainly familiar with the history, I'm familiar with your
6 overall argument.

7 On the question of standing, let me put it to you
8 bluntly, why is your argument not foreclosed by the Second
9 Circuit's decision in Carey v. Klutznick?

10 MR. SHUMATE: It's not foreclosed by Carey, your
11 Honor, because the injury in this case, the alleged injury is
12 not fairly traceable to the government. Instead, the injury
13 that's alleged here is the result of the independent action of
14 third parties to make a choice not to respond to the census in
15 violation of a legal duty to do so. That was not at issue in
16 the Carey case. The Carey case is also distinguishable on --

17 THE COURT: So you make two distinct arguments with
18 respect to standing. The first is that there is no injury in
19 fact; and the second is that there is no traceability.

20 Is the injury in fact argument foreclosed by Carey v.
21 Klutznick?

22 MR. SHUMATE: No, it's not, your Honor, for two
23 reasons. Carey was a post-census case. So the injury there
24 was far more concrete than it is here. Here, we're two years
25 out from the census and the injuries that are alleged here are

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1 quit speculative. They depend on a number of speculative links
2 in the chain of causation that he we didn't have in Carey v.
3 Klutznick.

4 First we have to speculate first about why people
5 might not respond to the census. They might not respond for a
6 number of reasons. Paragraphs 47 to 53 of the plaintiffs'
7 complaint point to a number of different reasons: Distress to
8 the government, political climate, a number of different
9 things. But even assuming there is an increase in the -- a
10 decrease in the initial response rate, it's speculative whether
11 the Census Bureau's extensive efforts to follow up, what they
12 call nonresponse follow-up operations, will fail.

13 THE COURT: Can I consider those efforts in deciding
14 this question? Are those in the complaint? Am I not limited
15 to the allegations in the complaint?

16 It seems to me that you're relying pretty heavily on
17 records and issues outside of the complaint. That may well be
18 appropriate at summary judgment and, as many of the cases
19 you've cited are, in fact, on summary judgment. So why is that
20 appropriate for me to look at and consider at this stage?

21 MR. SHUMATE: Your Honor, on a 12(b)(1) motion to
22 dismiss the Court can consider evidence outside the pleadings
23 for purposes of establishing its jurisdiction.

24 Even if you limit the allegations to the complaint,
25 paragraph 53 makes no allegation that the Census Bureau's

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1 extensive efforts that they intend to implement to follow up
2 with individuals who may not respond to the census initially
3 will fail.

4 And then, finally, the third element of that
5 speculative chain of causation is that it's speculative whether
6 any undercount that results will be material in a way that will
7 ultimately affect the plaintiffs. As they acknowledge, there
8 are very complex formulas to determine apportionment and
9 federal funding. And we just don't know at this point whether
10 any undercount will be sufficient to cause them to have an
11 injury in 2020.

12 In Carey it was very different. It was in the census
13 year. There were already preliminary estimates that the census
14 figures were inaccurate because the Census Bureau was including
15 or using inaccurate address lists in New York City. So it
16 was -- there was a far stronger and tighter causal nexus
17 between the alleged injury and the government's action in that
18 case. And that case also didn't involve a question on the
19 citizenship -- a question on the census form.

20 THE COURT: You seem to reject the substantial risk
21 standard, citing the footnote in Clapper and suggest that it's
22 limited to Food and Drug Administration type cases.

23 What's your authority for that proposition and don't
24 the cases that are cited in the Clapper footnote stand for the
25 proposition that it's not so limited?

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1 MR. SHUMATE: Your Honor, I think under either
2 standard the plaintiffs' claims will fail. I think the
3 substantial risk test involves -- the cases that I have seen it
4 will have involved cases involving risk of Food and Drug
5 enforcement, or cases where there's a risk that the government
6 may institute prosecution, something like that.

7 The far more accepted test is certainly impending
8 injury. Either test, the plaintiffs can't show that there's a
9 substantial risk that their injuries will ultimately occur
10 because of these speculative chain of inferences that they have
11 to rely on to tie the addition of a question on a form to their
12 ultimate injury here, which is a loss of federal funding.

13 THE COURT: Are not they basing that inference on
14 statements of the government itself and former and current
15 government officials?

16 In other words, the government itself has said that
17 adding a citizenship question will depress response rates.
18 They've alleged in the complaint that there are states and
19 counties and cities that have a high incidence of immigrants
20 and it, therefore, would seem to follow that it would be
21 particularly depressed in those states.

22 At this stage in the proceedings, doesn't it demand
23 too much to expect them to be able to prove concretely what the
24 actual differential response rate is going to be and what the
25 concrete implications of that are going to be?

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1 MR. SHUMATE: Your Honor, they don't have to prove it
2 concretely. But those allegations that they're pointing to
3 only go to the initial response rate.

4 There's always been an undercount in the census in
5 terms of the initial response rate. I think in the 2010 census
6 it was 63 percent of the individuals responded to the initial
7 census questioning. So I think that's what the individuals --
8 the Census Bureau are referring to, that there may be a drop in
9 the initial response rate. But there are no allegations that
10 the Census Bureau's follow-up operations, which are quite
11 extensive, that those will fail. The only allegation that they
12 pointed to, I think it is paragraph 53 of the complaint that
13 says because of the reduced initial response rate, the Census
14 Bureau will have to hire additional enumerators to follow up
15 with those individuals. But it is entirely speculative whether
16 those efforts will fail. It's also speculative, even assuming
17 those efforts fail, whether the undercount will be material in
18 a way that ultimately affects the plaintiffs. Because this is
19 a pre-census case, it's not like Carey where there, like I said
20 earlier, there were already preliminary figures suggesting that
21 the Census Bureau had an inaccurate count in New York City.

22 THE COURT: Let me ask you about traceability. Why is
23 that argument not foreclosed by the Circuit's decision last
24 Friday in the NRDC v. NHTSA case. I don't know if you've seen
25 it, but the Court held that -- rejected an argument by the

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1 government that the connection between the potential industry
2 compliance and the agency's imposition of coercive penalties
3 intended to induce compliances too indirect to establish
4 causation and proceeds to say: As the case law recognizes, it
5 is well settled that for standing purposes petitioners need not
6 prove a cause-and-effect relationship with absolute certainty.
7 Substantial likelihood of the alleged commonality meets the
8 test. This is true even in cases where the injury hinges on
9 the reactions of the third parties to the agency's conduct.

10 MR. SHUMATE: I think the key is the language that you
11 read about coercive effect. There is no coercive effect here
12 by the government. In fact, the government is attempting to
13 coerce people to respond to the census. There's a statute that
14 requires individuals to respond to the census.

15 At the most what the plaintiffs have alleged is that
16 the government's addition of the citizenship question will
17 encouraged people not to respond to the census, even though
18 there may be a small segment of the population who would
19 otherwise respond not for -- putting aside the citizenship
20 question. This is a lot more like the Simon case from 1976,
21 which involved hospitals -- the IRS revenue ruling that granted
22 favorable tax treatment to hospitals. The allegation in that
23 case was that the government's decision was encouraging the
24 hospitals to deny access to indigents to hospital services.
25 And the Court said no, the injury in that case is not fairly

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1 traceable to the government's action, even though it may have
2 encouraged the hospitals to deny access, because it was fairly
3 traceable to the independent decisions of third parties, the
4 hospitals themselves.

5 That's exactly what we have here. We have an
6 independent decision by individuals not to respond to the
7 census. Moreover, that independent decision is unlawful
8 because there's a statute that makes individuals -- it requires
9 individuals to respond to the census.

10 THE COURT: Why does that matter? I think you made an
11 effort to distinguish Rothstein on that ground, or at least the
12 ground that the defendant's conduct in that case was allegedly
13 unlawful and it's not here. I would think for standing
14 purposes that that's more a merits consideration than a
15 standing question. For standing purposes, it's really just a
16 question of whether plaintiffs can establish injury that
17 resulted from some conduct of the defendants, in other words,
18 injury and causation. What does it matter if conduct is
19 unlawful, unlawful, or not?

20 MR. SHUMATE: It matters, your Honor, because the test
21 is that the injury must be fairly traceable to the government's
22 conduct; not the independent actions of third parties. And it
23 is not fair to attribute to the government the unlawful
24 decisions of third parties not to respond to a lawful question.

25 You mentioned the Rothstein case. That case was

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1 fundamentally different. That involved funding terror. That
2 is fundamentally different than adding a question to the census
3 questionnaire. And it's fair to assume that there would be a
4 causal relationship between giving money to terrorists and the
5 terrorists' acts themselves.

6 THE COURT: But the question is simply whether the
7 independent acts of third parties intervening break the chain
8 of causation such that it's no longer fairly traceable. I
9 think in that -- just looking at it from that perspective, what
10 does it matter whether the conduct on either side is legal or
11 not legal? It's just a simple question of whether it causes
12 injury and whether it's fairly traceable.

13 I mean, in other words where -- can you point me to
14 any Supreme Court case or Second Circuit case that says that
15 whether -- that the standing inquiry turns on whether the acts
16 of either the defendant or the intervening third parties are
17 lawful or unlawful?

18 MR. SHUMATE: There are cases. I believe it's the
19 O'Shea case from the Supreme Court that says in the context of
20 mootness, which is another related judicial review doctrine,
21 that we assume that parties follow the law. And so here we
22 should assume that individuals would respond to the census
23 consistent with their legal duty.

24 Let me put it this way. If everybody in America
25 responded to the census consistent with their legal duty, would

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1 the plaintiffs have any reason to complain about the
2 citizenship question? Of course not because there would be no
3 undercount at all. Every person in America would be counted.
4 They would have no reason to complain about the citizenship
5 question or any fear of an undercount or loss of federal
6 funding or apportionment.

7 Put it another way, as the Court did in Simon. If the
8 Court were to strike the citizenship question from the census
9 questionnaire, would that address or redress all the
10 plaintiffs' fear of an injury? Probably not because, as they
11 acknowledge, there's always an undercount in a census and
12 individuals will not respond to the census questionnaire for a
13 variety of reasons.

14 THE COURT: Well it would redress the injury to the
15 extent that it is fairly traceable to the citizenship question.

16 MR. SHUMATE: But it is not fairly traceable to the
17 citizen question. And the Simon Court talked about the chain,
18 the speculative chain of inferences that you had to reach in
19 that case to trace the injury from the government's action to
20 the ultimate injury. And here there are at least three steps
21 in the chain of causation. I've talked about them already. I
22 don't need to repeat them.

23 THE COURT: Let me ask you one final question on that
24 front and then I'll hear from the plaintiffs on standing.

25 You rely pretty heavily on the Supreme Court's

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1 decision in Clapper and the chain of causation or the chain of
2 inferences that the Court found inadequate there. Isn't there
3 a fundamental difference between that setting and this in the
4 sense that the plaintiffs there were individuals and
5 essentially needed to prove that they themselves had been
6 subjected to surveillance and it was that inquiry that required
7 the multiple levels of inferences that the Court found
8 inadequate?

9 Here, particularly in the states case where the
10 plaintiffs are states and cities and counties and the like,
11 we're talking about an aggregate plaintiff. So there is no
12 need to prove that a particular person didn't respond or is not
13 likely to respond to the census in light of question. The
14 question is just, on an aggregate level, will it depress the
15 rates and on that presumably one can look at the Census
16 Bureau's own history and studies and the like. Why is that not
17 fundamentally different and make it a different inquiry than
18 the one that was made in Clapper?

19 MR. SHUMATE: Certainly the injuries alleged in
20 Clapper and this case are different but the standing principles
21 are not. They still have to allege an injury that is not
22 speculative, that is concrete certainly, or at least
23 substantial risk that that injury will occur. Now this arises
24 in a different context, to be sure, but still they have alleged
25 an injury that is speculative at this point, and it is not

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1 fairly traceable to the government because of the independent
2 action of the third parties that are necessary for that action
3 to occur. As I said earlier, it's not fair to attribute to the
4 government actions of third parties that violate a statute that
5 the government is attempting to coerce people to respond to the
6 census. So it is not fair to attribute to the government their
7 failure to respond when the government is merely adding a
8 question to the form itself.

9 THE COURT: Let me hear from the plaintiffs on the
10 standing, please. If you could just for the record make sure
11 your repeat your names.

12 MR. SAINI: Your Honor, Ajay Saini from the State of
13 New York for the plaintiffs.

14 THE COURT: Proceed.

15 MR. SAINI: Your Honor, the plaintiffs intend to make
16 two points here today. First, that the injuries that they have
17 alleged are not speculative and, in fact, the plaintiffs'
18 action here, the inclusion of citizenship question on the 2020
19 census, creates a substantial risk of an undercount and poses a
20 serious threat to plaintiffs' funding levels as well as
21 apportionment and representational interests; and our second
22 point that the plaintiffs' injuries are in fact fairly
23 traceable to the defendants' actions.

24 THE COURT: Does your argument depend on my accepting
25 that the substantial risk standard is still alive and not

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1 inconsistent with certainly impending.

2 MR. SAINI: No, your Honor. We believe that there are
3 immediate injuries that have occurred here. We have alleged
4 that at paragraph 53 and -- 52 and 53 in which we state that
5 the announcement of the citizenship question has an immediate
6 deterrent effect and is already causing individuals to choose
7 not to, in anticipation of the census, not cooperate. But that
8 said, the substantial risk standard was affirmed just two years
9 ago in Susan B. Anthony List v. Driehaus and as a result -- by
10 the Supreme Court, and as a result the substantial risk
11 standard is available here.

12 Your Honor the plaintiffs' injuries here are not
13 speculative. First and foremost, the plaintiffs have shown
14 that there is a substantial risk that an undercount will occur
15 and the statements by the defendants over the last 40 years,
16 the repeated determination by the Census Bureau that a
17 citizenship question will, in fact, increase nonresponse, and
18 not only increase nonresponse, but those determinations also
19 include in the statements that a citizenship question would
20 deter cooperation with enumerators going door to door seeking
21 to count nonresponsive households is sufficient to find that
22 there is a substantial risk of undercounting here.

23 The defendants have mischaracterized paragraph 53 of
24 our complaint. We have, in fact, alleged that typical forms of
25 nonresponse follow-up will be ineffective at capturing

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1 individuals who are intimidated by the citizenship question.
2 And the typical form of nonresponse follow-up there is the use
3 of enumerators going door to door. And, again, Census Bureau's
4 longstanding determinations on this serve as sufficient proof
5 to show that, in fact, the nonresponse follow-up operations --
6 that there is a substantial risk that they will be effective.
7 In addition, your Honor this is -- we are still at the
8 beginning stage of this litigation and to the extent that we
9 need to determine whether or not some unspecified nonresponse
10 follow-up operations will somehow reduce potential undercount,
11 that would require further factual development at later stages
12 of the litigation.

13 THE COURT: Your view is that, therefore, I cannot or
14 should not consider the government's announced procedures and
15 plans on that front?

16 MR. SAINI: You need not consider it, your Honor, but
17 even if you were to consider it these unspecified allegations
18 regarding nonresponse follow-up would not be enough to defeat
19 the plaintiffs' claim that there is, in fact, a substantial
20 risk of an undercount here.

21 THE COURT: What's your answer to the argument that
22 there are multiple other steps in the chain of inferences that
23 are required for you to intervene including, for example, that
24 it will affect the counts in your geographic jurisdiction
25 disproportionately given the complex formulas at issue here for

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1 apportionment, for funding, etc., essentially it's too
2 speculative to know whether and to what extent it will have an
3 effect and that ultimately you also need to prove that it has a
4 material effect on those?

5 MR. SAINI: Your Honor, first we would note that we
6 are at the pleading stage here so we do not need to determine
7 with certainty the exact level of injury that we expect to
8 suffer, if we do intend to provide further factual development
9 in the form of expert and fact discovery to help further
10 elucidate the injuries that we expect to result.

11 But more importantly, your Honor, there is plenty of
12 case law relating to -- from here in the Second Circuit
13 relating to the viability of funding harms from undercounts
14 such as in Carey v. Klutznick, for instance, the Court
15 recognized that funding harms were sufficient to establish
16 Article III standing on the basis of plaintiffs' State and City
17 of New York's claims that an undercount would affect their
18 federal formula grants. And, similarly, the Sixth Circuit
19 found in the City of Detroit v. Franklin that undercounting
20 would affect potential funding under the Community Development
21 Block Grant Program which we also have alleged in our
22 complaint.

23 The last thing to note here --

24 THE COURT: Can I ask you a question. Mr. Shumate's
25 argument is that Carey is different because it's a post-census

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1 case and not a pre-census case and in that regard it didn't
2 involve the same degree of speculation with respect to there
3 being an undercount. What's your answer to that?

4 MR. SAINI: Our answer to that, your Honor, is, again,
5 plaintiffs here -- the defendants here have repeatedly
6 recognized that a citizenship question will impair the accuracy
7 of the census both by driving down response rates but also by
8 deterring cooperation with enumerators. That specific fact of
9 government acknowledgment that this causal connection exists
10 and that there's a substantial likelihood that a citizenship
11 question will result in undercounts is significant here.

12 In addition, we have also pointed to, in the complaint
13 at paragraphs 50 and 51, the results of pretesting conducted by
14 the Census Bureau which shows unprecedented levels of immigrant
15 anxiety. That pretesting also reveals that immigrant
16 households, noncitizen households are increasingly breaking off
17 interviews with Census Bureau officials. The results of that
18 pretesting show that not only is there a substantial likelihood
19 of an undercount here but there's a substantial likelihood of a
20 serious undercount here. That's more than enough for
21 plaintiffs to meet their burden.

22 THE COURT: And presumably those allegations are
23 relevant to the question of whether the in-person enumerator
24 follow-up would suffice to address any disparity; is that
25 correct?

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1 MR. SAINI: Yes, your Honor.

2 THE COURT: Can you turn to the question of
3 traceability and address that. The language in the cases
4 suggest that the intervening acts of third parties don't
5 necessarily break the chain of causation if there is a coercive
6 or determinative effect. I think the government's argument
7 here is that there is no coercive effect. In fact, to the
8 extent that the government coerces anything, it coerces people
9 to respond to the census because it's their lawful obligation
10 to do so.

11 So why is that not compelling argument?

12 MR. SAINI: Your Honor, the courts have repeatedly
13 acknowledged, including the Second Circuit just last week in
14 NRDC v. NHTSA that the government's acknowledgment of a causal
15 connection between their action and the plaintiffs' injury is
16 sufficient to find that the defendants' injury -- the
17 plaintiffs' injury is fairly traceable to the defendants'
18 conduct and that case law is sufficient to address this
19 particular point.

20 With respect to the illegality point that the
21 defendants have brought up here, we would point first to
22 Rothstein which shows that the illegal intervening actions of a
23 third party do not break the line of causation.

24 In addition, your Honor, while we haven't cited this
25 in our papers because this point was first brought up and

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1 explored in a reply brief, there are a line of cases relating
2 to data breaches, including in the D.C. Circuit, Attias v.
3 CareFirst, in which plaintiffs' injuries related to identity
4 theft, were fairly traceable to a company's lack of consumer
5 information data security policies in spite of the intervening
6 illegal action of the third parties, namely the hackers
7 stealing that confidential information.

8 THE COURT: Can you give me that citation?

9 MR. SAINI: I can give that to you -- it's in my bag,
10 so I will give that to you shortly. Apologize about that.

11 THE COURT: All right. Very good. Why don't you wrap
12 up on standing and we'll turn to the political question and APA
13 question.

14 MR. SAINI: One last note on standing, your Honor.
15 The plaintiff need only show that one city, state, or county
16 within their coalition has Article III standing to satisfy the
17 Article III requirement for the entire coalition. As a result,
18 it's more than plausible to include that at least one of the
19 cities, states and counties that we have alleged harms for
20 related to funding and apportionment are likely and
21 substantial -- at a substantial risk of harm here.

22 THE COURT: All right. Thank you.

23 MR. SAINI: Thank you, your Honor.

24 THE COURT: Mr. Shumate, back to you. Mr. Saini can
25 look for that cite in the meantime.

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1 Talk to me about political question and the APA and,
2 once again, my question to you is why are those arguments not
3 foreclosed by Carey v. Klutznick?

4 MR. SHUMATE: Your Honor, even assuming the plaintiffs
5 have standing the case is not reviewable for two reasons: One,
6 the political question doctrine, the second --

7 THE COURT: You have to slow down a little bit.

8 MR. SHUMATE: The APA is not reviewable because this
9 matter is committed to the agency's discretion.

10 With respect to Carey, again, that case did not
11 involve the addition of the question on the census
12 questionnaire. There was very little analysis of the political
13 question doctrine in that case. So it's hard to view that case
14 as foreclosing the arguments we're making here.

15 THE COURT: But I don't understand you to be arguing
16 that the decision with respect to the questions on the
17 questionnaire is a political question and other aspects of the
18 census are not political questions, or is that your argument?
19 And to the extent that is your argument, where do you find
20 support for that in the text of the enumeration clause?

21 MR. SHUMATE: So our argument is that the manner of
22 conducting the census is committed to Congress, and Congress
23 has committed that to the Secretary of Commerce. So to be sure
24 there have been cases reviewing census decisions but those have
25 been decisions involving how to count, who to count, things

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1 like that, should we use imputation --

2 THE COURT: Isn't that the manner in which the census
3 is conducted?

4 MR. SHUMATE: No. Those go squarely to the question
5 of whether there's going to be a person-by-person headcount of
6 every individual in America. That is the actual enumeration.
7 So in those cases there was law to apply. There was a
8 meaningful standard. Is there going to be an actual
9 enumeration?

10 This case is fundamentally different. This doesn't
11 implicate those issues how to count, who to count. It
12 implicates the Secretary's information gathering functions that
13 are pre-census itself. And there is simply no case that
14 addresses that question or decides -- or says that it's not a
15 political question.

16 THE COURT: Can you cite any case that has projected
17 challenges to the census on the political question grounds?

18 MR. SHUMATE: No, there haven't been any cases like
19 this one where a plaintiff is challenging the addition of a
20 question to the census questionnaire itself. There have been
21 cases --

22 THE COURT: You're telling me in the two hundred plus
23 years of the census and the pretty much every ten-year cycle of
24 litigation arising over it there has never been a challenge to
25 the manner in which the census has been conducted; this is the

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1 first one?

2 MR. SHUMATE: There has never been a challenge like
3 this one to the addition of a question on the census
4 questionnaire.

5 THE COURT: So it is specific to the addition of a
6 question then.

7 MR. SHUMATE: Right. Right. So there have been
8 cases --

9 THE COURT: In other words, that's the level on which
10 I should look at whether it's a political question and the
11 question -- literally adding the question is itself a political
12 question. That's your argument?

13 MR. SHUMATE: Right. You don't need to go any further
14 than that. Because our argument is that the Secretary's
15 choice, or Congress's choice of which questions to ask on the
16 census questionnaire is a political question. It is a value
17 judgment and a policy judgment about what statistical
18 information the government should collect. And there are no
19 judicially manageable standards that the court can apply to
20 decide whether that's a reasonable choice or not.

21 THE COURT: Why isn't the standard, and this becomes
22 relevant to the issues we'll discuss later, why isn't the
23 standard the one from the Supreme Court's decision in Wisconsin
24 v. City of New York that it has to be reasonably related to the
25 accomplishment of an actual enumeration? Why is that not the

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1 standard and why is that not judicially manageable?

2 MR. SHUMATE: Because that case implicated the actual
3 enumeration question. So there is a standard as to decide
4 whether the Secretary's actions are intended to count every
5 person in America. But that's not this case.

6 THE COURT: Isn't that the ultimate purpose of the
7 census?

8 MR. SHUMATE: That is the ultimate purpose of the
9 census, but the manner of conducting the census itself, the
10 information-gathering function in particular is a political
11 question. There is simply no law that the Court can find in
12 the Constitution to decide whether the government should
13 collect this type of information or that type of information.

14 THE COURT: So is it your argument that if the
15 Secretary decided to add a question to the questionnaire that
16 asks who you voted for in the last presidential election, that
17 that would be unreviewable by a court?

18 MR. SHUMATE: It would be reviewable by Congress but
19 not a court. That demonstrates why this is a political
20 question, because Congress has reserved for itself the right to
21 review the questions.

22 Two years before the census the Secretary has to
23 submit the questions to Congress. If Congress doesn't like the
24 questions, the Congress can call the Secretary to the Hill and
25 berate him over that; or they can pass a statute and say no,

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1 we're going to ask these questions. That's how the census used
2 to be conducted. It used to be that statutory decision about
3 which questions to ask on the census. But Congress has now
4 delegated that discretion to the Secretary. But ultimately it
5 is still a political question about the manner of conducting
6 the census that is committed to the political branches.

7 THE COURT: What if the Secretary added a question
8 that was specifically designed to depress the count in states
9 that -- we live in a world of red states and blue states.
10 Let's assume for the sake of argument that the White House and
11 Congress are both controlled by the same party. Let's call it
12 blue for now. And let's assume that the Secretary adds a
13 question that is intended to and will have the predictable
14 effect of depressing the count in red states and red states
15 only. Again, don't resist the hypothetical. Your argument is
16 that that's reviewable only by Congress and even if Congress,
17 even if there's a political breakdown and basically Congress is
18 not prepared to do anything about that question, that question
19 is not reviewable by a court?

20 MR. SHUMATE: Correct. Because it is a decision about
21 which question to ask. It wouldn't matter what the intent was
22 behind the addition of the question. It's fundamentally
23 different than a question, like the courts have reviewed in
24 other cases, about who to count, how to count, things like
25 that, should we count overseas federal employees. That's a

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1 judicially manageable question. We can decide whether those
2 individuals should be counted or not. It's different than
3 whether sampling procedures should be allowed because it
4 implicates the count itself. This is the pre-count
5 information-gathering function that is committed to the
6 political branches.

7 THE COURT: A lot of your argument turns on accepting
8 that the plaintiffs' challenges to the manner in which the
9 census is conducted as opposed to the enumeration component of
10 the clause. Isn't the gravamen of the plaintiffs' claim here
11 that by virtue of adding the question it will depress the count
12 and therefore interfere with the actual enumeration required by
13 the clause?

14 MR. SHUMATE: They're trying to make an actual
15 enumeration claim, but their factual allegations don't
16 implicate that clause of the Constitution at all because what
17 they're challenge is the manner in which the Secretary conducts
18 the information-gathering function delegated to him by
19 Congress.

20 So there is no allegation in the complaint, for
21 example, that the Secretary had not put in place procedures to
22 count every person in America. I think they would have to
23 concede that the Secretary has those procedures in place and
24 intends to count every person in America.

25 Now they argue that -- I will get to this later --

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1 they argue that the question will depress the count itself.
2 But that would lead down a road where they can -- plaintiffs
3 could challenge the font of the form itself, the size of the
4 form, whether it should be put on the internet, or the other
5 questions on the form itself: Race, sex, Hispanic origin.
6 These are matters that are committed to the Secretary's
7 discretion for himself.

8 THE COURT: That may be committed to his discretion
9 but that's a different question than whether they're completely
10 unreviewable by a court, correct?

11 In other words, it may well be that there's a place
12 for courts to review the decisions of the Secretary but giving
13 appropriate deference to those decisions? Isn't that a
14 fundamental distinction?

15 MR. SHUMATE: That is correct, your Honor. Even if
16 you assume that it is not a political question, the court would
17 still -- should grant significant deference to the Secretary if
18 the court gets to the enumeration clause claim.

19 THE COURT: Let's talk about the APA argument and
20 whether it's committed to the discretion of the agency by law.

21 Can you cite any authority for the proposition that a
22 census decision is so committed or is your point that this case
23 has never -- this is an issue of first impression effectively?

24 MR. SHUMATE: The later point, your Honor. This is a
25 question of first impression. However, Webster v. Doe, a

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1 Supreme Court case, involved similar statutory language. I'll
2 read that language. It said --

3 THE COURT: How do you square that with Justice
4 Stevens' concurring opinion in Franklin where he essentially
5 distinguished Webster on several grounds?

6 MR. SHUMATE: He did not get a majority of the Court,
7 your Honor, so it wouldn't be controlling.

8 THE COURT: I understand that. I'm not controlled by
9 it. But on the merits, tell me why he is not right.

10 In other words, the language in Webster was deemed
11 advisable. That's not the language here. The structure of the
12 Act at issue in Webster and the purpose of the Act, namely
13 national security, implicated fairly significant considerations
14 that are absent here. Here, there's an interest in
15 transparency and the like that was absent or the exact opposite
16 in Webster.

17 MR. SHUMATE: I respectfully disagree. To be sure, Webster
18 involved national security where the courts have
19 historically deferred significantly to the political branches.
20 But so have courts also deferred to political branches when it
21 comes to the census. The Wisconsin case from the Supreme Court
22 makes that quite clear.

23 THE COURT: But holds that it's reviewable.

24 MR. SHUMATE: A case involving the actual enumeration
25 question, not a case involving the Secretary's

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1 information-gathering function.

2 And I think we need to focus on the specific language
3 of the statute itself, which was not involved -- not at issue
4 in Franklin, did not involve a question about what questions to
5 ask on the form.

6 The statute here says: Congress has delegated to the
7 Commerce the responsibility to conduct a census, quote, in such
8 form and content as he may determine.

9 THE COURT: Slow down.

10 MR. SHUMATE: Such form and content as he may
11 determine. As he may determine. That is very similar to the
12 language in Webster, that he deems advisable.

13 So there is simply nothing in the statute itself that
14 a court can point to, to decide whether it's reasonable to ask
15 one question or another because the statute says he has -- the
16 Secretary himself has the discretion to decide the form and
17 content of the census questionnaire itself.

18 THE COURT: I take it that language was added to the
19 statute in 1976; is that right?

20 MR. SHUMATE: I'm sorry. I don't understand.

21 THE COURT: That language was added to the statute in
22 1976?

23 MR. SHUMATE: I think the statute I'm pointing to is a
24 1980 statute, Section 141 of the census, because it says the
25 Secretary shall conduct the census in 1980 and years -- so

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1 perhaps --

2 THE COURT: Probably passed before 1980.

3 MR. SHUMATE: Right. Right.

4 THE COURT: Is there anything in the legislative
5 history that you're aware of that suggests that Congress
6 intended to render the Secretary's decisions on that score
7 totally unreviewable?

8 MR. SHUMATE: I'm not aware of any legislative
9 history, your Honor, on this question about whether courts
10 should be permitted to review the Secretary's choice of which
11 questions to ask on the census.

12 THE COURT: All right. Very good. Anything else on
13 these two points? Otherwise I'll hear from plaintiffs.

14 MR. SHUMATE: I don't think so, your Honor.

15 THE COURT: All right. Thank you.

16 Good morning.

17 MS. GOLDSTEIN: Good morning, your Honor.

18 Elena Goldstein for the plaintiffs. Before I begin,
19 your Honor, I do have that citation that my colleague
20 referenced. Attias v. CareFirst, Inc. That is 865 F.3d 620.

21 THE COURT: Thank you.

22 MS. GOLDSTEIN: That was from 2017.

23 THE COURT: You may proceed.

24 MS. GOLDSTEIN: Thank you, your Honor.

25 Before I get to the heart of defendants' arguments, I

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1 want to address this decision that they've made to get very
2 granular with respect to the question, with respect to the
3 exact conduct of the Secretary here.

4 The defendants contend repeatedly that this is a case
5 of first impression and that no case has ever challenged a
6 question on the census. That fact highlights the extreme and
7 outlandish nature of defendants' conduct here.

8 If you look at the wide number of census cases that
9 are out there, that I know we've all been looking at, there's a
10 common theme. And the common theme is that the Census Bureau
11 and the Secretary aim for accuracy.

12 If you look at the Wisconsin case, there the Secretary
13 determined not to adjust the census using a post-enumeration
14 survey had some science on his side. The Court says the
15 Secretary is trying to be more accurate, has some science, we
16 will defer. Utah v. Evans is similar. The determination to
17 use a type of statistic known as hot-deck imputation, the
18 Secretary says we're trying to be more accurate, we will defer.

19 This case turns that factual predicate on its head and
20 in a most unusual way. Instead of the Secretary aiming for
21 accuracy, the Secretary here has acknowledged that he's
22 actually moving in the opposite direction.

23 THE COURT: So let's say I agree with you. Why under
24 the language of the clause and the language of the statute is
25 that not a matter for Congress to deal with?

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1 Congress has required the Secretary to report to
2 Congress the questions that he intends to ask sufficiently in
3 advance of the census that Congress could act, that the
4 democratic process could run its course. Why is that not the
5 answer instead of having a court intervene?

6 MS. GOLDSTEIN: Your Honor, defendants confuse the
7 grant of authority to Congress for a grant of sole and
8 unreviewable authority. They draw this -- there's a vast
9 number of cases out there that are holding, as the Court has
10 noted, that these census cases are not, in fact, political
11 questions. So in order to distinguish between all of those
12 cases and this one case that defendants argue is not
13 justiciable defendants proffer this novel distinction between
14 the manner of the headcount and the headcount itself. But that
15 distinction is a false dichotomy that collapses on further
16 review. In many cases, including this one, the manner of the
17 headcount absolutely impacts the obligation to count to begin
18 with. In this case plaintiffs have specifically alleged that
19 defendants' decision to demand citizenship information from all
20 persons will reduce the accuracy of the enumeration. That is,
21 in defendant's effective parlance, a counting violating. And
22 it's easy to think of many other examples in which the manner
23 of the headcount is absolutely bound up in the headcount
24 obligation itself. For example, the decision, as defendants
25 point out, between Times New Roman and Garamond font, likely

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1 within the government's discretion. But the decision to put
2 the questionnaire in size two Garamond font that's unreadable,
3 for example, on the questionnaire, that would be certainly a
4 decision that would impact the accuracy of the enumeration.
5 The decision to send out all the questionnaires in French would
6 impact the accuracy of the enumeration.

7 THE COURT: Right. But not every problem warrants or
8 even allows for a judicial solution, right. Indeed the Supreme
9 Court said as much last week in some cases, like why is the
10 remedy there not Congress stepping in and taking care of that
11 problem, mandating that it be distributed in 17 languages
12 instead of one, mandating that it be in twelve-point font, etc.

13 Why is a court to supervise, at that level of
14 granularity, the Secretary's conduct that is committed to him
15 by statute?

16 MS. GOLDSTEIN: Your Honor, defendants' political
17 question argument depends on this manner versus headcount
18 distinction. They acknowledge that everything else courts can
19 review, not review on that granular level but review under
20 Wisconsin to affirm that the Secretary's decision bears a
21 reasonable relationship to the accomplishment of an
22 enumeration.

23 Courts do not analyze cases in this fashion. The
24 starting point, as the Court has recognized, is Carey. This is
25 a case that is, I think by any fair reading, a manner case. It

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1 involved the adequacy of address registers. It involved the
2 adequacy of enumerators going out. The Court there holds
3 squarely that this is not a political question.

4 And looking at even Wisconsin, your Honor, the Court
5 there recognized that the Secretary's discretion to not adjust
6 the census in that case arises out of the manner language of
7 the statute.

8 Virtually every court to consider this issue has held
9 the fact that Congress has authority over the census does not
10 mean that that is sole or unreviewable authority.

11 THE COURT: What is the judicially manageable standard
12 to use?

13 The defendants throw out some hypotheticals as to
14 whether it would constitute a violation of the -- let me put it
15 differently.

16 Is the standard the pursuing accuracy standard that
17 you articulate in your brief and to some extent you've
18 articulated here?

19 MS. GOLDSTEIN: Yes, your Honor.

20 I think that the baseline standard is the standard in
21 Wisconsin, that defendants are obligated to take decisions that
22 bear a reasonable relationship to the accomplishment of an
23 actual enumeration, and accomplishing an actual enumeration
24 means trying to get that count done, which means pursuing
25 accuracy. Whatever the outer limits of that decision may be,

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1 your Honor, it is not taking decisions that affirmatively
2 undermine that enumeration.

3 THE COURT: So defendants cite a number of
4 hypotheticals in their reply brief, for example, the question
5 of whether to hire 550 as opposed to 600,000 in-person
6 enumerators; the question of whether to put it in 12 languages
7 versus 13 languages.

8 Is it your position that those aren't reviewable but
9 presumably acceptable on the merits or -- I mean what's your
10 position on those?

11 MS. GOLDSTEIN: Yes, your Honor.

12 The vast majority of those kinds of decisions made by
13 the Secretary are well within the bound of the discretion
14 that's laid out in Wisconsin. But as you push those examples
15 further, the decision to send 500 enumerators versus 450,
16 clearly within the Secretary's discretion. Both accomplish an
17 actual enumeration and are calculated to do so.

18 But the decision to send no enumerators or no
19 enumerators to a particular state, that begins to look more
20 questionable as to whether or not that decision would bear a
21 reasonable relationship to accomplish an enumeration and, under
22 defendants', theory would be entirely unreviewable.

23 THE COURT: Turning to the APA question, I think you
24 rely in part on the mandatory language in some places in the
25 census act. There is no question that the Act mandates that

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1 the Secretary do X, Y, and Z but the relevant clause here would
2 seem to be the permissive one, namely, in such form and content
3 as he may determine.

4 So why are the mandatory aspects of the Act even
5 relevant to the question of whether it's committed to agency
6 discretion?

7 MS. GOLDSTEIN: Your Honor, with respect to the plain
8 language of the Census Act, I would argue that Section 5 which
9 directs the Secretary to determine the question -- the
10 mandatory language directs the Secretary to determine the
11 questions and inquiries on the census is more specific than the
12 form and content language that even arguably is permissive in
13 Section 141.

14 In addition, as plaintiffs have noted in that their
15 papers, there are multiple sources for law to apply in this
16 case, both from those mandatory requirements of the Census Act
17 from the constitutional purposes undergirding the census, the
18 Constitution and the Census Act, and the wide array of
19 administrative guidance out there dictating specifically how
20 the Census Bureau has and does add questions to the decennial
21 questionnaire. In light of that mosaic of law, there is no
22 question that the vast majority of courts to consider this
23 question have concluded that challenges to the census are
24 reviewable, that there is law to apply.

25 THE COURT: And to the extent that you rely on the

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1 Census Bureau's own guidance, don't those policy statements
2 have to be binding in order to provide law to apply?

3 MS. GOLDSTEIN: No, your Honor. The starting point
4 here -- so defendants are arguing that there is no law to apply
5 at all. And the Second Circuit in the Salazar case makes very
6 clear that the Court can look to informal agency guidance to
7 determine whether or not there is law to apply.

8 In Salazar the Court was looking to dear-colleague
9 letters that no one alleged gave rise to a finding of a private
10 right of action. But at the same time those dear-colleague
11 letters, in conjunction with other law out there, formed the
12 basis for agency practices and procedures that departures
13 therefrom could be judged to be arbitrary or capricious.

14 So, too, in this case. Plaintiffs have identified a
15 wide arrange of policies and practices and procedural guidance
16 dictating the many testing requirements that questions are
17 typically held to and required to go through prior to being
18 added to the decennial census the defendants have entirely
19 ignored here. I'm happy to distinguish the cases that
20 defendants have cited if the Court would like me to continue on
21 this.

22 THE COURT: No. I think I'd like to turn to the
23 enumeration clause issue at this point.

24 Mr. Shumate, you're back up.

25 MR. SHUMATE: Thank you, your Honor.

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1 THE COURT: Do you agree that the relevant standard
2 comes from Wisconsin is the reasonably related or reasonable
3 relationship to the accomplishment of an actual enumeration
4 that that is the guiding standard here?

5 MR. SHUMATE: I think that would be the guiding
6 standard in a case involving a question over whether the
7 Secretary has procedures in place to conduct an actual
8 enumeration, but that is not this case. This is a case
9 involving the information-gathering function that takes place
10 during the census. And there is no standard to apply.

11 THE COURT: What is the authority -- Ms. Goldstein
12 just argued that it's a false dichotomy and a false distinction
13 that you're trying to draw between the manner and the
14 enumeration. I mean it seems to me that there is some -- it's
15 hard to draw that -- a clear distinction in the sense that
16 clearly the manner in which the Secretary conducts the census
17 will determine, in many instances, whether it actually is an
18 accurate actual enumeration.

19 So are there cases that you can point to that draw
20 that distinction and indicate that it is as bright line as
21 you're suggesting?

22 MR. SHUMATE: I can't, your Honor, because frankly
23 there hasn't been a case like this one involving the facial
24 challenge to the addition of a question itself. But even
25 assuming that is the standard, there's nothing in the

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1 Constitution that forecloses the Secretary from asking this
2 questions on the census questionnaire. There is no allegation
3 that the Secretary doesn't have procedures in place to conduct
4 person-by-person headcount in the United States. And as the
5 Secretary said in his memo at pages one and eight, he intends,
6 again, procedures in place to make every effort to conduct a
7 complete and accurate census. So they're not challenging the
8 procedures themselves. They're not challenging the follow-up
9 operations. They're just challenging the addition of a
10 question itself.

11 THE COURT: What about the hypothetical that the
12 Secretary decides to send in-person enumerators only to states
13 in certain regions of the country. Why would that not be a
14 violation of the enumeration clause?

15 MR. SHUMATE: I think that would be, first of all, a
16 very different case, but there may be a valid claim there if
17 the Secretary had not put in place procedures to count every
18 person in the United States.

19 THE COURT: Procedures sounds an awful lot like
20 manner, no? In other words, why is that not a manner case as
21 well that ultimately goes to the enumeration?

22 MR. SHUMATE: Because it implicates the count itself.
23 It's not the questions on the form itself that are used to
24 collect the information to count itself. So it's a
25 fundamentally different situation.

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1 But, again, they don't have those allegations in the
2 complaint here that the number of enumerators are insufficient.
3 The only challenge here is to the addition of a question
4 itself.

5 We can't ignore the fact that this question has been
6 asked repeatedly throughout our history, as early as 1820 and
7 as most recently as the 2000 census. And as the Wisconsin
8 Court made clear, history is fundamentally important in a
9 census case because the government has been doing this since
10 1790.

11 THE COURT: I take it your view is I can consider that
12 history on a 12(b)(6) motion because there are undisputed
13 facts, essentially historical facts.

14 MR. SHUMATE: Historical facts that take judicial
15 notice of the fact that the question has been asked repeatedly
16 throughout history.

17 THE COURT: Why does history not cut in both
18 directions in the sense that the question was abandoned from
19 the short-form census since 1950; in other words, for the last
20 68 years it has not been a part of the census.

21 MR. SHUMATE: It has been part of the long-form census
22 which went to one in six households, and those households
23 didn't get the short form. So under their view it was
24 unconstitutional for the government to send the long-form
25 census to one in six houses, it was unconstitutional for the

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1 government to ask this question in 1950 and in 1820, and that
2 cannot possibly be right.

3 Let me address their point about the standard is
4 accuracy, the Secretary has to do everything to pursue
5 accuracy. That can't possibly be the standard. It's a made-up
6 standard. It doesn't come from the cases. And it's simply
7 unworkable.

8 On this question of the font on the form itself.
9 There's nothing for the court to evaluate to decide whether
10 that would be a permissible choice or not. It would give rise
11 to courts second guessing everything that the Secretary does to
12 collect the information for the census. And that's -- it's
13 simply not a case where the allegations implicate the
14 procedures that are in place to count every person in America;
15 instead this is case implicating the information-gathering
16 function.

17 THE COURT: Now in United States v. Rickenbacker,
18 Justice Marshall, for whom this courthouse is named, wrote
19 that, "The authority to gather reliable statistical data
20 reasonably related to governmental purposes and functions is a
21 necessity if modern government is to legislate intelligently
22 and effectively. The questions contained in the household
23 questionnaire related to important federal concerns such as
24 housing, labor and health and were not unduly broad or sweeping
25 in their scope."

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1 Now admittedly that was in the context of a Fourth
2 Amendment challenge to a criminal prosecution of someone who
3 refused to respond to the census. But why is that not the
4 relevant standard here?

5 It seems to me that the census's dual purpose, I
6 think, has always been about getting an accurate count for
7 purposes of allocating seats in the House of Representatives,
8 but from time immemorial it seems that it also was used to
9 collect data on those living in this country and that that has
10 been deemed an acceptable, indeed, important function of it.

11 So why is that not a sensible standard to apply here?

12 MR. SHUMATE: Your Honor, it may be. But if that's
13 the standard, there is no reason that the addition of a
14 citizenship question would run afoul of that standard.

15 Again, the question has been asked repeatedly.

16 THE COURT: First of all, two questions. One is
17 doesn't that provide a judicially manageable standard? Again,
18 recognizing the deference of it to the Secretary on his
19 judgments with respect to it, but at least it is a standard
20 against which the Secretary's judgments can be measured, no?

21 MR. SHUMATE: I don't know where that standard comes
22 from, your Honor. It certainly doesn't come from --

23 THE COURT: Thurgood Marshall.

24 MR. SHUMATE: That doesn't come from the Constitution,
25 because the Constitution simply says the manner of conducting

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1 the census. The plaintiffs are right. That's not the standard
2 that the plaintiffs are pressing. They're pressing the
3 standard that the Secretary has to do everything to pursue
4 accuracy. And if that's right, then the plaintiff can claim
5 that the questions about race and sex and Hispanic origin are
6 also unconstitutional.

7 THE COURT: But you don't make the argument that
8 that's the relevant standard to apply in your brief?

9 MR. SHUMATE: No, your Honor. The standard to apply,
10 if there is one, is actual enumeration. And the plaintiffs
11 haven't made any allegations that the Secretary does not have
12 procedures in place to conduct an actual enumeration.

13 THE COURT: And the purposes for which the question
14 was added, obviously in the Administrative Record the stated
15 purpose was to enforce -- help enforce the Voting Rights Act.
16 Are there additional purposes that would justify addition of
17 the question and, relatedly, are those purposes somewhere in
18 the record?

19 MR. SHUMATE: Your Honor, the standard rationale was
20 the one provided by the Secretary in his memorandum. If we
21 ever get to the APA claim, that would be the basis on which the
22 Court would review the reasonableness of his decision.

23 But in terms of the constitutional claim, plaintiffs
24 have to show, notwithstanding all the significant deference
25 that the Secretary is entitled to, that the addition of this

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1 question violates the Constitution. But, again, there is no
2 suggestion here that the Secretary does not have procedures in
3 place to count every person in America, and it can't be the
4 standard that anything that might cause an undercount would be
5 somehow unconstitutional, because that would call into question
6 many other questions on the form, and it would ignore the long
7 history that this question has been asked on the census.

8 THE COURT: And I guess -- what if the political
9 climate in our country was such that the administration was
10 thought to be very anti gun, let's say, and there were
11 perceived threats to gun ownership, thoughts that the
12 administration and the federal government would seize people's
13 guns, and that administration proposed adding a question to the
14 census about whether and how many guns people owned. Do you
15 think that would not violate the enumeration clause?

16 MR. SHUMATE: It would not violate the clause, and
17 Congress could provide a remedy and pass a statute and say this
18 is not a question that should be asked on the census. It
19 wouldn't be for a court to decide this question is bad, this
20 one is good. That is something that is squarely committed to
21 the political branches to decide.

22 THE COURT: Who is handling this for the plaintiffs?

23 Ms. Goldstein again. All right.

24 Tell me why the Thurgood Marshall standard shouldn't
25 apply here.

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1 MS. GOLDSTEIN: Your Honor, even if the Thurgood
2 Marshall standard would apply, as I can address in a moment,
3 this question would still violate it. But the Supreme Court in
4 Wisconsin, a more recent case, has made clear the standards
5 that the Court uses to assess the Secretary's decisionmaking
6 authority with respect to the census and that is whether or not
7 the Secretary's decisions bear a reasonable relationship to the
8 accomplishment of an actual immigration keeping in mind the
9 constitutional purposes of the census.

10 THE COURT: Tell me, measured against that standard,
11 why asking any demographic questions on the census would pass
12 muster, in other words, presumably asking about race, about
13 sex, about all sorts of questions that have long been on the
14 census, I mean they certainly don't -- they're not reasonably
15 related to getting an accurate count because they don't do
16 anything to advance that purpose and they presumably, to the
17 extent they have any effect, it is to depress the count if only
18 because people view filling out the form as more of a pain.

19 So how would any of those questions pass muster under
20 that test?

21 MS. GOLDSTEIN: Your Honor, this is not an ordinary
22 demographic question.

23 THE COURT: That's not my question though. In other
24 words, based on the test that you are articulating wouldn't any
25 demographic question on the questionnaire fail?

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1 MS. GOLDSTEIN: Absolutely not, your Honor. Ordinary
2 questions which are subject to extensive testing procedures
3 that are precisely designed in order to assess and minimize and
4 deal with any impacts to accuracy likely do, when they emerge
5 from the end point of that testing, bear a reasonable
6 relationship to the accomplishment of an actual enumeration.
7 The Secretary is permitted under Wisconsin to privileged
8 distributional accuracy over numerical accuracy. So if adding
9 a gender question or a race question brings down the count a
10 certain percent, there is no suggestion that that is
11 disproportionately impacting certain groups as defendant Jarmin
12 has acknowledged with respect to this situation.

13 THE COURT: What about sexuality? Could the Secretary
14 ask about sexuality in the interests of getting public health
15 information, perhaps?

16 MS. GOLDSTEIN: Your Honor, I think to answer that
17 question we would need to wait and see the procedures that the
18 Census Bureau puts that question to, for example, with respect
19 to the race and ethnicity question that the Secretary looked at
20 for nearly a decade subjecting it to focus group testing
21 cognitive testing, all sorts of testing to assess the impact on
22 accuracy.

23 Now to the extent that a sexuality question had a
24 disproportionate impact that the Secretary acknowledged and
25 recognized and decided to take an action to reduce the accuracy

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1 of the census nonetheless, that may well state a claim. But
2 the vast majority of decisions that the Secretary may make will
3 not.

4 Now in this case -- there may be hard cases out there,
5 your Honor, but this case is an easy case.

6 THE COURT: And is the standard an objective one, I
7 assume? If one doesn't like at the intent of the Secretary or
8 the government in adding the question, presumably it's an
9 objective test of whether it's reasonably related to the goal
10 of an actual enumeration.

11 MS. GOLDSTEIN: That is correct, your Honor.

12 However, defendants acknowledged recognition of the
13 deterrent effect of this question certainly is good evidence
14 that this will, in fact, undermine the enumeration and does not
15 reasonably relate it to accomplishing enumeration.

16 THE COURT: But because it's objective evidence. In
17 other words, let's assume for the sake of argument that the
18 question was added by the Secretary to suppress the count in
19 certain jurisdictions -- I'm not suggesting that that is the
20 case but let's assume -- is that relevant to whether it states
21 a claim under the enumeration clause.

22 MS. GOLDSTEIN: No, your Honor, but it may be well
23 relevant to the claim under the APA.

24 THE COURT: Go back to the Thurgood Marshall standard
25 and tell me why that should not be the relevant standard here.

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1 It seems to me, as I mentioned to Mr. Shumate, that the census
2 has long had essentially a dual purpose. On the one hand, it
3 is intended to get an actual enumeration and count the number
4 of people in our country for purposes of representation. On
5 the other hand, it has long been accepted that it's a means by
6 which the government can collect data on residents of the
7 country. So why is -- it seems to me that the questions on the
8 questionnaire are more tethered to that later purpose and if
9 that's the case there is a little bit of a mismatch in
10 measuring the acceptability of a question against whether it's
11 reasonably related to the first goal.

12 MS. GOLDSTEIN: Your Honor, plaintiffs are to some
13 extent hampered on this because defendants have not proffered
14 the standard or argued it.

15 THE COURT: They say there is no standard which is why
16 it's a political question.

17 MS. GOLDSTEIN: But the end of that sentence that you
18 read by Justice Marshall made clear that even on that standard
19 of gathering additional demographic data that there are
20 questions that are unduly broad in scope.

21 Now here what we are alleging, that the Secretary of
22 Commerce has made a decision that reverses decades of settled
23 position that the Census Bureau recognizes that this specific
24 question will reduce the accuracy of the enumeration; in their
25 words from 1980, will inevitably jeopardize the accuracy of the

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1 count, where defendants themselves have recognized that this
2 may have, as defendant Jarmin indicated, important impacts in
3 immigrant and Hispanic communities against this particular
4 historical and cultural moment where this administration's
5 anti immigration policy --

6 THE COURT: Let me ask you a question about that and
7 try and get at what role that plays in the argument. Let's
8 assume for the sake of that argument that the prior
9 administration had added the citizenship question in a
10 different climate. New administration comes in, whether it's
11 this one or some other one, that is perceived to be very
12 anti immigrant. Does the existence of the question suddenly
13 become unconstitutional because the political climate has
14 changed?

15 MS. GOLDSTEIN: I think that the starting point in
16 this case is significant. The starting point is a reversal of
17 decades of the settled position. The starting point is without
18 a single test or even explanation as to why that position is
19 being changed. The starting point is a recognition that it
20 will impair accuracy. I think if this is a long-standing
21 question, this has been on the census, that might be a
22 different situation.

23 Just to address defendants' contention that the
24 historical practice weighs in favor of them, I think setting
25 aside that I do think that this is a merits question, this gets

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1 the merits wrong. This question has not been asked of all
2 respondents since 1950. It, instead, has been relegated to the
3 longer form instrument where the citizenship demand is one of
4 many questions. On the ACS it can be statistically adjusted.
5 Failure to answer does not bring a federal employee to your
6 door, knocking on it, demanding to know if you are a citizen.

7 THE COURT: How can it be constitutional to include it
8 on a long-form questionnaire and not on a short-form
9 questionnaire? In other words, how can the constitutionality
10 of whether the question is proffered or asked turn on the
11 length of the questionnaire?

12 MS. GOLDSTEIN: The question before the Court is
13 whether or not the decision that was made several months ago to
14 add this question to the long-form questionnaire that goes to
15 all households, whether or not that question is constitutional.
16 The question of whether or not it was constitutional in 1970 I
17 believe when it was -- when the world was different, when it
18 was originally on the long form is not before the court. The
19 question has not been -- has been asked on the ACS since 2005.

20 Now defendants' allegations that the ACS is
21 effectively the same thing as the census I think really belie
22 or ignore the allegations in plaintiffs' complaint. The Census
23 Bureau has for decades repeatedly resisted calls to move the
24 question from the ACS to the census precisely because while the
25 question may perform on the ACS it does not perform on the

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1 census because it undermines the accuracy of that instrument.

2 THE COURT: Why, measured against the reasonable
3 relation standard that you're pressing, would the mere use of
4 the long-form questionnaire, why wouldn't that be
5 unconstitutional?

6 In other words, I think that the response rate of
7 those who receive the long-form questionnaire is significantly
8 lower than the response rate of those who receive the
9 short-form questionnaire. On your argument wouldn't that be
10 unconstitutional under the enumeration clause?

11 MS. GOLDSTEIN: Your Honor, I think that just the lack
12 of testing and the conduct with respect to this decision alone
13 makes this decision distinguishable. With respect to the
14 change in the long-form questionnaire, with respect to the ACS,
15 with respect to those other demographic questions, they went
16 through considered detailed procedures designed to assess and
17 to minimize impacts on accuracy. Those tests, those procedures
18 were entirely ignored here. And that alone distinguishes the
19 Secretary's conduct.

20 THE COURT: All right. Thank you very much.

21 That concludes the argument on the motion to dismiss.
22 Let me check with the court reporter whether we need a break or
23 not.

24 She is willing to proceed so I am as well.

25 Why don't we hear from plaintiffs on discovery since

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1 they're the moving parties on that front. I think the papers
2 are fairly adequate for me to address most of the issues on
3 this front. In that regard I don't intend to have a lengthy
4 oral argument but I don't want to deprive you of your moment in
5 the sun, Mr. Colangelo.

6 MR. COLANGELO: Thank you, your Honor.

7 Good morning. Matthew Colangelo from New York for the
8 state and local government plaintiffs. I'll make two key
9 points regarding the record. First is that the record the
10 United States has prepared here is deficient on its face and
11 should be completed. It deprives the Court of the opportunity
12 to review the whole record as it's obligated to do under
13 Section 706 of the APA. And the second broad argument I'll
14 make is that the plaintiffs have, even once the record is
15 completed, we anticipate the need for extra record discovery in
16 light of the evidence of bad faith, the complicated issues
17 involved in this case and, of course, the constitutional claim.

18 So turning to the first argument, as I've mentioned,
19 the APA requires the Court to review the whole record. In
20 Dopico v. Goldschmidt the Second Circuit --

21 THE COURT: Can I ask you a threshold question, which
22 is why I shouldn't hold off until I've decided the motion to
23 dismiss in light of the Supreme Court's decision in the DACA
24 litigation arising out of California.

25 MR. COLANGELO: The circumstances in the DACA

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1 litigation, your Honor, were extremely different and
2 distinguishable from the circumstances here. The Court in that
3 case pointed out that the United States had made an extremely
4 strong showing of the overbroad nature of the discovery
5 request. I believe the solicitor general's reply on cert to
6 the Supreme Court mentioned that they would be obligated to
7 review and produce 1.6 million records. So it was against the
8 backdrop of that extremely broad production request that the
9 Court said that it might make -- the Court directed the
10 district court to stay its discovery order until it resolved
11 the threshold questions. Nobody is requesting 1.6 million
12 records here, your Honor.

13 THE COURT: How do I know that since the question of
14 what you're requesting is not yet before me.

15 MR. COLANGELO: I think, among other reasons, your
16 Honor, you know that because the United States hasn't made any
17 contention at all that there's anything near the size of that
18 record that's being withheld in this case as they did in the
19 DACA litigation.

20 There are, to use the language from Dopico, there are
21 a number of conspicuous absences from the record presented here
22 and we would draw your attention to four in particular.

23 The first is that with the exception of background
24 materials, there is essentially nothing in the record that
25 predates the December 2017 request from the Justice Department.

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1 There is no record at all of communications with other federal
2 government components. The new supplemental memo that the
3 Secretary added to the record just twelve days ago now
4 discloses for the first time that over the course of 2017 the
5 Secretary and his senior staff had a series of conversations
6 with other federal government components. None of those
7 records are anywhere in the Administrative Record that the
8 United States produced.

9 Second, again with the exception of the December 2017
10 memo, the United States hasn't produced anything at all
11 reflecting the Justice Department's decision where, as here,
12 the heart of the Secretary's rationale for asking about
13 citizenship, according to his March decision memo, was the
14 supposed need to better enforce sections of the Voting Rights
15 Act. It's just not reasonable to believe that there are no
16 other records that he directly or indirectly considered in the
17 course of reaching his decision. In fact, the Secretary
18 testified to Congress under oath that we had a lot of
19 conversations with the Justice Department. If that's the case,
20 those conversations ought to be included in the record.

21 The third key category of materials that are
22 conspicuously omitted include records of the stakeholder
23 outreach that the Secretary did conduct over the course of --
24 earlier this year. The Secretary's decision memo says he
25 reached out to about two dozen stakeholders. Other than what

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1 appear to be undated, after-the-fact post hoc summaries that
2 somebody somewhere prepared of those calls, there is no
3 information at all about how those 24 stakeholders were
4 selected; why, for example, was the National Association of
5 Home Builders one of the stakeholders that the Secretary
6 elected to reach out to here. The government has omitted the
7 Secretary's briefing materials. All of these records are
8 records that are necessary to help understand the government's
9 decision.

10 And then the final category of materials conspicuously
11 omitted are the materials that support Dr. Abowd's conclusion
12 that adding this question would be costly and undermine the
13 accuracy of the count. Dr. Abowd is the Census Bureau's chief
14 scientist. Obviously materials that he relied on in reaching
15 that adverse conclusion are materials that the Secretary
16 indirectly considered and that body of evidence should be
17 included in the record as well.

18 THE COURT: Why don't you briefly speak to the bad
19 faith argument and then I want to address the question of scope
20 and what should and shouldn't be permitted if I allow
21 discovery. I don't know if that's you or Mr. Rios who is
22 planning to address that.

23 MR. COLANGELO: I can address scope and then I will
24 turn to Mr. Rios to address one aspect of our anticipated
25 expert discovery, your Honor.

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1 On bad faith, your Honor, we think there are at least
2 five indicia of bad faith here, more than enough -- more than
3 enough certainly singularly to justify expanding the record but
4 in collection we think they make an overwhelming case.

5 THE COURT: List them quickly if you don't mind.

6 MR. COLANGELO: Why don't I focus on two. First is
7 the tremendous political pressure that was brought to bear on
8 the Commerce Department and the Census Bureau. The record that
9 the Justice Department presented discloses what appear to be
10 four telephone calls between Kris Kobach and the Commerce
11 Secretary or his senior staff on this question at a time that
12 the Commerce Secretary now admits he was considering how to
13 proceed on this question. The Justice Department's only
14 response in the paper they filed with the Court is that that
15 appears to be isolated or unsolicited and quite frankly, your
16 Honor, that's just not credible. The Commerce Secretary and
17 the senior staff had four telephone calls with an adviser to
18 the President and Vice-President on election law issues on the
19 exact question that the Secretary now acknowledges he was then
20 considering. Mr. Kobach presented to the Secretary proposed
21 language to this question that matches nearly verbatim the
22 language that the Secretary ultimately decided to add to the
23 census questionnaire and yet the only conclusion one can draw
24 is that it was isolated, incidental and immaterial contact.
25 That's just not a reasonable position to take without exploring

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1 more of the record.

2 The second argument that I'll mention briefly, that
3 the shifting chronology here that the Commerce Department has
4 presented we think also presents a strong case of bad faith.
5 The March decision memo explicitly describes the Commerce
6 Department's consideration of this question as being in
7 response to the requests they received from the Justice
8 Department. The Secretary's more or less contemporaneous sworn
9 testimony to Congress repeats that point several times. In at
10 least three different congressional hearings he uses language
11 like we are responding only to the Justice Department; as you
12 know, Congressperson, the Justice Department initiated this
13 request; and then just twelve days ago the Commerce Secretary
14 supplemented the record and disclosed that, in fact, the
15 Commerce Department recruited the Justice Department to request
16 this question, which certainly suggests that the Commerce
17 Department knew where it wanted to go and was trying to build a
18 record to support it. The rest of the arguments are set out in
19 our papers, your Honor.

20 THE COURT: So talk to me about what the scope of
21 discovery that you're seeking is and why I shouldn't, if I
22 authorize it at all, severely constrain it.

23 MR. COLANGELO: Well, your Honor, I think we're
24 actually looking for quite tailored discovery here and I think
25 we can stagger it, I think as an initial --

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1 THE COURT: It's grown from three or four depositions
2 at the initial conference to twenty.

3 MR. COLANGELO: Fair enough, your Honor. But at the
4 initial conference we didn't have the Administrative Record
5 that disclosed the role of Mr. Kobach at the instruction of
6 Steve Bannon. We didn't know that Wendy Teramoto, the
7 Secretary's chief of staff, had a series of e-mails and several
8 phonecalls with Mr. Kobach at the exact same time they were now
9 considering this question.

10 So, respectfully, our blindfolded assessment of what
11 we might need has expanded slightly, but I still think it's a
12 reasonable and reasonably tailored request. And so I would say
13 a couple of things.

14 First, I think the Justice Department ought to
15 complete the record by including the materials that are
16 conspicuously omitted and that they acknowledge exist and they
17 ought to do that in short order and at the same time ought to
18 present a privilege log so that we can assess, without
19 guessing, what their claims of privilege are and why those
20 claims are or are not defensible.

21 I think once we have completed the administrative
22 record, I think there is additional discovery, particularly in
23 the nature of testimonial evidence, some third-party discovery,
24 of course, Mr. Kobach, the campaign, Mr. Bannon, potentially
25 some others. I think it's critical that we get evidence from

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1 the Department of Justice because the Department of Justice
2 ostensibly was the basis for the Secretary's decision, and then
3 expert testimony, which we can turn to in a moment.

4 THE COURT: And then talk to me about Mr. Kobach,
5 Mr. Bannon. First of all, wouldn't it suffice, if I authorize
6 discovery, to allow you to seek that discovery from the
7 Commerce Department and/or the Justice Department alone? In
8 other words, the relevance of whatever input they gave is what
9 impact it had on the decision-makers at Commerce and that can
10 be answered by discovery through Commerce alone. I'm not sure
11 it warrants or necessitates expanding to third parties and
12 then, second to that, Mr. Bannon is a former White House
13 adviser and that implicates a whole set of separate and rather
14 more significant issues, namely separation of powers issues,
15 and executive privilege issues, and so forth. Why should I
16 allow you to go there?

17 MR. COLANGELO: A couple of reasons, your Honor.
18 First of all I do think we can table the question. I'm not
19 prepared to concede that he we don't need third-party
20 discovery. It may well be the only way that we can understand
21 the basis for the Secretary's decision. But I do think we can
22 table it to see, especially if we can do it quickly, what the
23 actual completed record looks like and what other documents and
24 potentially other testimonial evidence may disclose. And we
25 certainly wouldn't be seeking to take third-party depositions

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1 next week.

2 And I appreciate the concerns, obviously, about
3 executive privilege. But we do have the separate -- two
4 separate issues here. One is that the Secretary has testified
5 to Congress that he was not aware at all of any communications
6 from anyone in the White House to anyone on his team. So if it
7 now turns out that that congressional testimony may have
8 omitted input from Mr. Bannon, I think we would want to discuss
9 the opportunity to seek further explication of what exactly
10 happened.

11 And then the final reason why I'm not prepared to
12 concede that this additional evidence may not be necessary is
13 the involvement of political access here is problematic for the
14 Commerce Department's decision in a way that might not arise in
15 an ordinary policy judgment case for two reasons. First, it's
16 not consistent with the Secretary's presentation of his
17 decision in his decision memo; but second, the Census Bureau is
18 a statistical agency that is governed by the White House's own
19 procedures that govern how statistical agencies ought to
20 operate and among the core tenets of those procedures is
21 independence and autonomy from political actors. So to the
22 extent that there was undue political involvement in the
23 decision here, we think that it probably does bear somewhat
24 heavily on the Court's ability to assess the record.

25 But I don't disagree that we can stagger it. I'm just

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1 not prepared to concede now that we won't need it.

2 THE COURT: Let me hear from Mr. Rios briefly and then
3 I'll here from Mr. Shumate -- excuse me, not Mr. Shumate.

4 Go ahead.

5 MR. RIOS: May it please the Court, your Honor,
6 Rolando Rios on behalf of the plaintiffs. My brief comments,
7 your Honor, are addressed to the need for discovery on an
8 Article I claim. My clients, Hidalgo and Cameron Counties, are
9 on the southernmost Texas border between Mexico and the United
10 States. It is the epicenter of the hysterical anti immigrant
11 rhetoric from the federal government. McAllen and Brownsville
12 are the county seats. It is a microcosm, your Honor, of what
13 is going on across the country in the Latino community. Quite
14 frankly, the minority community across the country is
15 traumatized by the federal government's actions.

16 THE COURT: Mr. Rios, I don't mean to cut you off but
17 if you could get to the expert discovery point that you want to
18 make.

19 MR. RIOS: Yes, your Honor. The general comments that
20 I have is that based on their own expert's testimony that the
21 citizenship question will increase the nonresponsiveness I feel
22 it's important that expert testimony to update that data based
23 on the present environment is essential. Your Honor, the
24 importance of census data is lost sometimes here. I've been
25 practicing voting rights law for 30 years. And, quite frankly,

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1 census data is the gold standard that the federal courts use to
2 adjudicate the allocation of judicial power -- I mean
3 electoral power and political power and federal resources. So
4 this citizenship question is designed to tarnish that gold
5 standard and basically deny our clients the political power
6 that they're entitled to and also federal funds.

7 THE COURT: Thank you very much. Let me hear from
8 Ms. Vargas I think it is.

9 MR. FREEDMAN: Your Honor, do you want to hear from us
10 before the defendants or --

11 THE COURT: I didn't realize that you wished to have a
12 word.

13 MR. FREEDMAN: Sorry, your Honor.

14 THE COURT: Sure. That makes more sense, that order.
15 Go ahead.

16 MR. FREEDMAN: Your Honor, John Freedman for the NYIC
17 plaintiffs. I could add additional points to what the state
18 did on why the record needs to be supplemented. I could point
19 to additional gaps. A lot of those are covered in our letter.
20 I could point to additional evidence why expansion of the
21 record is appropriate and layout bad faith. But I think,
22 again, I think that's covered in the letter.

23 THE COURT: OK.

24 MR. FREEDMAN: I do think it is worth emphasizing that
25 we have an additional constitutional claim, equal protection

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1 claim, that we believe entitles us to discovery. The basis for
2 that is Rule 26 to start with, which says that we have the
3 right to conduct discovery to any issue that's relevant.
4 Certainly, the equal protection claim has elements that are not
5 and do not overlap with the APA claim, including intent and
6 impact and the history into the decision. We think that under
7 the Supreme Court precedence, Webster v. Doe, we are entitled
8 to conduct discovery and that there is a parallel APA claim.

9 THE COURT: It strikes me that the Supreme Court's
10 decision In re United States, the DACA litigation, counsel is
11 cautioned in allowing discovery before a court has considered
12 threshold issues. I think the state's case is a little
13 different in the sense that I have heard oral argument and have
14 already gotten full briefing on those issues and in that regard
15 can weigh that in the balance. But obviously the motion in
16 your case is not yet fully submitted.

17 MR. FREEDMAN: It will be soon.

18 THE COURT: It will be soon. That is true.

19 MR. FREEDMAN: I think with respect to our case we can
20 argue it now, you can take it under advisement until there is a
21 ruling. I also think there's an important distinction in the
22 way the DACA case was handled in terms of supplementing the
23 administrative record and that can be going on while the
24 government has already put forward a record that is manifestly
25 deficient. Their work you can provide guidance to them to how

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1 they supplement it while the motion is under consideration. I
2 think that that's permitted under how the Supreme Court ruled
3 in the DACA case.

4 THE COURT: Anything else?

5 MR. FREEDMAN: I do want -- just on scope. Obviously,
6 you were asking questions about scope and how to control it. I
7 think that the constitutional precedence we would cite Webster
8 v. Doe on intent of decision-makers. All counsel have active
9 involvement of the court in making sure discovery is tailored.
10 We do have tailored discovery in mind. We weren't here at the
11 May 4 conference obviously. We've always been approaching this
12 as, because we have additional elements on our intentional
13 discrimination claim, that we have additional things that we'd
14 like to be able to prove, that under Arlington Heights we are
15 entitled to prove. That's part of the reason why the
16 deposition list is a little bit longer.

17 I also do think it would be helpful to get guidance
18 from the Court on the question of the supplementation of
19 Administrative Record. In particular, we cited cases in our
20 letter spelling out that it's the obligation of the Agency, not
21 just merely the Secretary, to produce records that are under
22 consideration. We think that the Court should provide guidance
23 that the whole record should include materials prior to
24 December 12 and the pre-decisional determination to reach out
25 to other agencies and have them sponsor the question. In many

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1 ways looking at that prehistory, there's a parallel between
2 this case and what happened in Overton Park which is the
3 seminal Supreme Court case here where the Court was hamstrung
4 by its ability to review the case because all that the
5 Department of Transportation had produced was effectively a
6 post-litigation record. And I think you could look at what the
7 Department has done here as a similar or analogous circumstance
8 that they made a decision that they wanted to have this
9 question. They had a response, then they said we're now on the
10 clock, it's now time to start building our record, and that's
11 what we're going to produce, and we don't have the real record
12 before us.

13 THE COURT: Thank you.

14 Let me hear from Ms. Vargas and then we'll proceed.

15 Ms. Vargas, tell me why the supplemental memo or
16 addition to the Administrative Record alone doesn't give rise
17 to the need for discovery here. It seems that the ground has
18 shifted quite dramatically; that initially in both the
19 Administrative Record and in testimony the Secretary's position
20 was that this was requested by the Department of Justice and lo
21 and behold in a supplemental memo of half a page without
22 explanation it turns out that that's not entirely the case. So
23 doesn't that point to the need for discovery?

24 MS. VARGAS: Your Honor, there is nothing inconsistent
25 between the supplemental memo and the original memo. The

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1 original memo addresses a particular point in time. There is a
2 receipt of the DOJ letter. It's uncontested that it was
3 received on a particular date. At that point, as the Secretary
4 said in his original memo, we gave a hard look, after we
5 received the formal request from the Department of Justice, and
6 then he details the procedures and the analysis that he started
7 at that point in time.

8 THE COURT: First of all, isn't it material to know
9 that that letter was generated by a request from the Secretary
10 himself as opposed to at least the misleading suggestion that
11 it was from the Department of Justice without invitation?

12 MS. VARGAS: Your Honor, I resist the suggestion that
13 it was misleading as an initial matter.

14 THE COURT: That's my question. Isn't it misleading
15 or at least isn't there a basis to conclude that it's
16 misleading and therefore an entitlement for the plaintiffs to
17 probe that?

18 MS. VARGAS: No, your Honor. It's not misleading. It
19 simply starts at a particular point in time and it goes
20 forward. It doesn't speak whatsoever to the process that
21 preceded the receipt of the DOJ memo and that's because the
22 Administrative Record does not include internal deliberations,
23 the consultative process, or the internal discussions that
24 happen inter-agency or intra-agency. That's very settled law.
25 It's black letter administrative law that what is put on the

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1 administrative record is the decisional document and the
2 informational basis for that decision but not the discussions
3 that precede that or that go along with it. That has been the
4 decisions of the Second Circuit, the D.C. Circuit en banc in
5 San Luis Obispo. All of those courts speak to the fact that
6 the internal conversations, the process documents, are not part
7 of the administrative record and so, therefore, they wouldn't
8 normally be disclosed. All the things that precede a decision
9 internally, the processes, the discussions, none of that would
10 normally be part of an administrative record and it wouldn't
11 normally be part of a decisional document. Normally when an
12 agency issues a decision it doesn't go through: And then we
13 had this discussion, and then there was this discussion and
14 they arrive at --

15 THE COURT: But it does include the underlying data
16 that the decision-maker considered or that those advising the
17 decision-maker considered and how can it possibly be that the
18 Secretary began conversations about this shortly after he was
19 confirmed and there is literally virtually nothing in the
20 record between that date and December 12 or whatever the date
21 is that the letter arrives from the Department of Justice? It
22 just -- doesn't that --

23 MS. VARGAS: Data is a different matter, your Honor.
24 The underlying information and data we believe is included and
25 there is -- there is some allegation that the data that the

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1 Census Bureau relied upon in generating analyses of the DOJ
2 request was not included in the Administrative Record.

3 Now the summary of that analysis, in fact, is included
4 in the Administrative Record. It is in the Abowd -- two
5 different Abowd memos that are part of the Administrative
6 Record.

7 Raw data itself, the raw census data from which that
8 analysis is generated is protected by law. It's
9 confidential --

10 THE COURT: I don't mean the data but the analyses of
11 those who are advising the Secretary on whether this is a good
12 idea or bad idea.

13 MS. VARGAS: Well to the extent they are discussing
14 pros and cons, analysis, recommendations, all of that would
15 fall within the deliberative process privilege.

16 THE COURT: Why should that not be on a privilege log?

17 MS. VARGAS: Because, your Honor, courts have
18 routinely held that privilege logs are not required in APA
19 cases precisely because these documents are not part --

20 THE COURT: Didn't the Second Circuit say exactly the
21 opposite in the DACA litigation out of the Eastern District?

22 MS. VARGAS: Respectfully no, your Honor, it did not.
23 I believe you're talking about the Nielsen slip order in which
24 they denied a writ of mandamus. So, first of all, we're
25 talking about a denial of a writ of mandamus which, of course,

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1 is reviewing the district court decision under an exceedingly
2 high standard, whether or not there are extreme circumstances
3 warranting overturning the district court's decision.
4 Obviously, of course, it's also not a published opinion but an
5 order of the court, it's nonbinding. But on the merits I do
6 not believe that the Second Circuit stated that privilege logs
7 are required. If you look at the district court order that's
8 being reviewed in that case, the District Court had decided
9 that on the facts of that case a privilege log was required
10 because it had found that the government had acted in bad
11 faith. So there was -- it wasn't binding that in every APA
12 case privilege logs are required. The District Court had said
13 that in constructing the administrative record the agency had
14 not included all of the documents that were directly or
15 indirectly before the decision-maker. And in that specific
16 circumstance where there had been that history, it said that we
17 are not affording the normal presumption of regularity to the
18 government and it was going to require a privilege log. And
19 the Second Circuit did not grant writ of mandamus to overturn
20 that decision.

21 But it doesn't stand for a broader proposition that in
22 all APA cases privilege logs are required. The vast weight of
23 authority is, in fact, to the contrary. Because these
24 documents are not part of an administrative record in the first
25 place, you don't log them; just as in civil discovery, if a

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1 document is not responsive to a document request, you don't put
2 it on a privilege log. The same principle applies in this
3 case.

4 THE COURT: All right. Anything else you want to say?

5 MS. VARGAS: Yes, your Honor. I did want to address a
6 couple of points on the scope of discovery, particularly expert
7 discovery. They are trying to take advantage of an exception
8 that doesn't really apply to have broad expert discovery in a
9 case when the Second Circuit in Sierra Club has specifically
10 said it is error for a district court in an APA case to allow
11 experts to opine and to challenge the propriety of an agency
12 decision.

13 THE COURT: Well, the way I read Sierra Club it
14 doesn't speak to whether expert discovery should be authorized
15 in the first instance. It speaks to the deference owed to the
16 agency and whether a court can rely on an expert -- expert
17 evidence in order to supplant or disregard the agency's
18 opinion. But that's a merits question. It's not a question
19 pertaining to discovery.

20 MS. VARGAS: I disagree, your Honor. I think what the
21 Second Circuit said is that expert discovery -- extra record,
22 expert discovery for the purposes of challenging the agency's
23 expert analysis is absolutely error and should not be allowed
24 because of the fact that record review in an APA case under
25 Supreme Court precedent, Camp v. Pitts, it must be confined to

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1 the record.

2 THE COURT: What if the bad faith exception applies?

3 MS. VARGAS: Well the bad faith exception, of course,
4 is a separate exception. Specific to the expert point.

5 THE COURT: But my question is that if I find that the
6 presumption of regularity has been rebutted and the bad faith
7 exception applies, does that not open the door to expert
8 discovery, putting aside the ultimate question of whether and
9 to what extent I could rely on that expert discovery or
10 evidence in terms of evaluating the Secretary's decision?

11 MS. VARGAS: No, your Honor. Because the exceptions
12 for the record review rule are to be narrowly construed. So to
13 the extent that your Honor found that there was bad faith,
14 which we obviously contest and don't believe extra record
15 discovery is appropriate here, but if the Court were to find
16 that, then the discovery had to be narrowly tailored to the
17 points on which you found that there was some allegation of bad
18 faith. So, for example, if there was a very specific issue
19 that your Honor thought needed to be developed that perhaps
20 could be ordered but it wouldn't open the door up to make this
21 just a regular civil litigation under Rule 26 with broad
22 discovery allowed on all claims on all issues and any expert
23 discovery they wanted. It doesn't open the door that wide. It
24 just has to be narrowed to the specific point on which you
25 find. But, of course, the government does not concede, it does

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1 not believe that discovery would be appropriate in this case.

2 THE COURT: I understand.

3 MS. VARGAS: Thank you, your Honor.

4 THE COURT: All right. I was largely prepared to rule
5 on the discovery question based on the papers and nothing I've
6 heard from counsel has altered my view so I am prepared to give
7 you my ruling on that front.

8 In doing so, I am of course mindful of the Supreme
9 Court's decision In re United States, 138 S. Ct. 443 (2017)
10 (per curiam), holding in connection with lawsuits challenging
11 the rescission of DACA that the district court should have
12 resolved the government's threshold arguments before deciding
13 whether to authorize discovery -- on the theory that the
14 threshold arguments, "if accepted, likely would eliminate the
15 need for the district court to examine a complete
16 Administrative Record." That is from page 445 of that
17 decision. I do not read that decision, however, to deprive me
18 of the broad discretion that district courts usually have in
19 deciding whether and when to authorize discovery despite a
20 pending motion to dismiss; indeed, the Supreme Court's decision
21 was expressly limited to "the specific facts" of the case
22 before it. That's from the same page. More to the point,
23 several considerations warrant a different approach here.
24 First, unlike the DACA litigation, this case does not arise in
25 the immigration and national security context, where the

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1 Executive Branch enjoys broad, indeed arguably broadest
2 authority. Second, time is of the essence here given that the
3 clock is running on census preparations. If this case is to be
4 resolved with enough time to seek appellate review, whether
5 interlocutory or otherwise, it is essential to proceed on
6 parallel tracks. Third, and most substantially, unlike the
7 DACA litigation, defendants' threshold argument here are fully
8 briefed, at least in the states' case. See Regents of
9 University of California v. U.S. Department of Homeland
10 Security, 279 F.Supp. 3d 1011, at 1028 (N.D. Cal. 2018)
11 discussing the procedural history of the DACA litigation and
12 making clear that the motion to dismiss was not filed at the
13 time that discovery was authorized. Although I reserve
14 judgment on those threshold arguments, and I should make clear
15 that I am reserving judgment on the motion to dismiss at this
16 time, I am sufficiently confident, having read the parties'
17 briefs and heard the oral argument today that the state and
18 city plaintiffs' claims will survive, at least in part, to
19 warrant proceeding on the discovery front. Moreover, I hope to
20 issue a decision on the threshold issues in short order. So in
21 the unlikely event that I do end up dismissing plaintiffs' case
22 in its entirety, it is unlikely that defendants will have been
23 heavily burdened in the interim.

24 With that, let me turn to the three broad categories
25 of additional discovery that plaintiffs in the two cases have

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1 sought in their letters of June 26, namely, a privilege log for
2 all materials withheld from the record on the basis of
3 privilege; completion of the previously filed Administrative
4 Record; and extra record discovery. See docket no. 193 in the
5 states' case, that is plaintiffs' letter in that case. For
6 reasons I will explain, I find that plaintiffs have the better
7 of the argument on all three fronts. I will address each in
8 turn and then turn to the scope and timing of discovery that I
9 will allow.

10 The first issue whether defendants need to produce a
11 privilege log is easily resolved. Put simply, defendants'
12 arguments are, in my view, squarely foreclosed by the Second
13 Circuit's December 17, 2017 rejection of similar arguments In
14 re Nielsen. That is docket no. 17-3345 (2d Cir. December 27 or
15 17, I think, 2017). That is the DACA litigation pending in the
16 Eastern District of New York. I recognize, of course, that
17 that was -- it arises in a mandamus petition and it is
18 unpublished, but I think the reasons articulated by the Court
19 of Appeals counsel for the production of a privilege log here.
20 If anything, the justifications for requiring production of a
21 privilege log are stronger here as the underlying documents do
22 not implicate matters of immigration or national security and
23 the burdens would appear to be substantially less significant
24 or at least defendants have not articulated a particularly
25 onerous burden. Moreover, whereas the defendants in Nielsen

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1 had at least identified some basis for asserting privilege,
2 namely the deliberative process privilege, defendants here, at
3 least until the argument a moment ago, did not provide any such
4 basis. See the states' letter at page two, note three.
5 Accordingly, defendants must produce a privilege log
6 identifying with specificity the documents that have been
7 withheld from the Administrative Record and, for each document,
8 the asserted privilege or privileges.

9 Second, plaintiffs seek an order directing the
10 government to complete the Administrative Record. Although an
11 agency's designation of the Administrative Record is generally
12 afforded a presumption of regularity, that presumption can be
13 rebutted where the seeking party shows that "materials exist
14 that were actually considered by the agency decision-makers but
15 are not in the record as filed." Comprehensive Community
16 Development Corp. v. Sebelius, 890 F.Supp. 2d 305, 309
17 (S.D.N.Y. 2012). Plaintiffs have done precisely that here.

18 In his March 2018 decision memorandum produced in the
19 Administrative Record at page 1313, Secretary Ross stated that
20 he "set out to take a hard look" at adding the citizenship
21 question "following receipt" of a request from the Department
22 of Justice on December 12, 2017. Additionally, in sworn
23 testimony before the House Ways and Means Committee, of which I
24 can take judicial notice, see, for example, Ault v. J. M.
25 Smucker Company, 2014 WL 1998235 at page 2 (S.D.N.Y. May 15,

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1 2014), Secretary Ross testified under oath that the Department
2 of Justice had "initiated the request for inclusion of the
3 citizenship question." See the states' letter at page four.
4 It now appears that those statements were potentially untrue.
5 On June 21, this year, without explanation, defendants filed a
6 supplement to the Administrative Record, namely a half-page
7 memorandum from Secretary Ross, also dated June 21, 2018. That
8 appears at docket no. 189 in the states' case. In this
9 memorandum, Secretary Ross stated that "soon after" his
10 appointment as Secretary, which occurred in February of 2017,
11 almost ten months before the request from the Department of
12 Justice, he "began considering" whether to add the citizenship
13 question and that "as part of that deliberative process," he
14 and his staff "inquired whether the department of justice would
15 support, and if so would request, inclusion of a citizenship
16 question." In other words, it now appears that the idea of
17 adding the citizenship question originated with Secretary Ross,
18 not the Department of Justice and that its origins long
19 predated the December 2017 letter from the Justice Department.
20 Even without that significant change in the timeline, the
21 absence of virtually any documents predating DOJ's
22 December 2017 letter was hard to fathom. But with it, it is
23 inconceivable to me that there aren't additional documents from
24 earlier in 2017 that should be made part of the Administrative
25 Record.

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1 That alone would warrant an order to complete the
2 Administrative Record. But, compounding matters, the current
3 record expressly references documents that Secretary Ross
4 claims to have considered but which are not themselves a part
5 of the Administrative Record. For example, Secretary Ross
6 claims that "additional empirical evidence about the impact of
7 sensitive questions on the survey response rates came from the
8 Senior Vice-President of Data Science at Nielsen." That's page
9 1318 of the record. But the record contains no empirical
10 evidence from Nielsen. Additionally, the record does not
11 include documents relied upon by subordinates, upon whose
12 advice Secretary Ross plainly relied in turn. For example,
13 Secretary Ross's memo references "the department's review" of
14 inclusion of the citizenship question, and advice of "Census
15 Bureau staff." That's pages 1314, 1317, and 1319. Yet the
16 record is nearly devoid of materials from key personnel at the
17 Census Bureau or Department of Commerce -- apart from two
18 memoranda from the Census Bureau's chief scientist which
19 strongly recommend that the Secretary not add a citizenship
20 question. Pages 1277 and 1308. The Administrative Record is
21 supposed to include "materials that the agency decision-maker
22 indirectly or constructively considered." Batalla Vidal v.
23 Duke, 2017 WL 4737280 at page 5 (E.D.N.Y. October 19, 2017).

24 Here, for the reasons that I've stated, I conclude
25 that the current Administrative Record does not include the

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1 full scope of such materials. Accordingly, plaintiffs' request
2 for an order directing defendants to complete the
3 Administrative Record is well founded.

4 Finally, I agree with the plaintiffs that there is a
5 solid basis to permit discovery of extra-record evidence in
6 this case. To the extent relevant here, a court may allow
7 discovery beyond the record where "there has been a strong
8 showing in support of a claim of bad faith or improper behavior
9 on the part of agency decision-makers." National Audubon
10 Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without
11 intimating any view on the ultimate issues in this case, I
12 conclude that plaintiffs have made such a showing here for
13 several reasons.

14 First, Secretary Ross's supplemental memorandum of
15 June 21, which I've already discussed, could be read to suggest
16 that the Secretary had already decided to add the citizenship
17 question before he reached out to the Justice Department; that
18 is, that the decision preceded the stated rationale. See, for
19 example, Tummino v. von Eschenbach, 427 F.Supp. 2d 212, 233
20 (E.D.N.Y. 2006) authorizing extra-record discovery where there
21 was evidence that the agency decision-makers had made a
22 decision and, only thereafter took steps "to find acceptable
23 rationales for the decision." Second, the Administrative
24 Record reveals that Secretary Ross overruled senior Census
25 Bureau career staff, who had concluded -- and this is at page

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1 1277 of the record -- that reinstating the citizenship question
2 would be "very costly" and "harm the quality of the census
3 count." Once again, see Tummino, 427 F.Supp. 2d at 231-32,
4 holding that the plaintiffs had made a sufficient showing of
5 bad faith where "senior level personnel overruled the
6 professional staff." Third, plaintiffs' allegations suggest
7 that defendants deviated significantly from standard operating
8 procedures in adding the citizenship question. Specifically,
9 plaintiffs allege that, before adopting changes to the
10 questionnaire, the Census Bureau typically spends considerable
11 resources and time -- in some instances up to ten years --
12 testing the proposed changes. See the amended complaint which
13 is docket no. 85 in the states' case at paragraph 59. Here, by
14 defendants' own admission -- see the amended complaint at
15 paragraph 62 and page 1313 of the Administrative Record --
16 defendants added an entirely new question after substantially
17 less consideration and without any testing at all. Yet again
18 Tummino is instructive. See 427 F.Supp. 2d at 233, citing an
19 "unusual" decision-making process as a basis for extra-record
20 discovery.

21 Finally, plaintiffs have made at least a prima facie
22 showing that Secretary Ross's stated justification for
23 reinstating the citizenship question -- namely, that it is
24 necessary to enforce Section 2 of the Voting Rights Act -- was
25 pretextual. To my knowledge, the Department of Justice and

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1 civil rights groups have never, in 53 years of enforcing
2 Section 2, suggested that citizenship data collected as part of
3 the decennial census, data that is by definition quickly out of
4 date, would be helpful let alone necessary to litigating such
5 claims. See the states case docket no. 187-1 at 14; see also
6 paragraph 97 of the amended complaint. On top of that,
7 plaintiffs' allegations that the current Department of Justice
8 has shown little interest in enforcing the Voting Rights Act
9 casts further doubt on the stated rationale. See paragraph 184
10 of the complaint which is docket no. 1 in the Immigration
11 Coalition case. Defendants may well be right that those
12 allegations are "meaningless absent a comparison of the
13 frequency with which past actions have been brought or data on
14 the number of investigations currently being undertaken," and
15 that plaintiffs may fail "to recognize the possibility that the
16 DOJ's voting-rights investigations might be hindered by a lack
17 of citizenship data." That is page 5 of the government's
18 letter which is docket no. 194 in the states case. But those
19 arguments merely point to and underscore the need to look
20 beyond the Administrative Record.

21 To be clear, I am not today making a finding that
22 Secretary Ross's stated rationale was pretextual -- whether it
23 was or wasn't is a question that I may have to answer if or
24 when I reach the ultimate merits of the issues in these cases.
25 Instead, the question at this stage is merely whether --

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1 assuming the truth of the allegations in their complaints --
2 plaintiffs have made a strong preliminary or prima facie
3 showing that they will find material beyond the Administrative
4 Record indicative of bad faith. See, for example, Ali v.
5 Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For
6 the reasons I've just summarized, I conclude that the
7 plaintiffs have done so.

8 That brings me to the question of scope. On that
9 score, I am mindful that discovery in an APA action, when
10 permitted, "should not transform the litigation into one
11 involving all the liberal discovery available under the federal
12 rules. Rather, the Court must permit only that discovery
13 necessary to effectuate the Court's judicial review; i.e.,
14 review the decision of the agency under Section 706." That is
15 from Ali v. Pompeo at page 4, citing cases. I recognize, of
16 course, that plaintiffs argue that they are independently
17 entitled to discovery in connection with their constitutional
18 claims. I'm inclined to disagree given that the APA itself
19 provides for judicial review of agency action that is "contrary
20 to" the Constitution. See, for example, Chang v. USCIS, 254
21 F.Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if
22 plaintiffs are correct on that score, it is well within my
23 authority under Rule 26 to limit the scope of discovery.

24 Mindful of those admonitions, not to mention the
25 separation of powers principles at stake here, I am not

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1 inclined to allows as much or as broad discovery as the
2 plaintiffs seek, at least in the first instance. First, absent
3 agreement of defendants or leave of Court, of me, I will limit
4 plaintiffs to ten fact depositions. To the extent that
5 plaintiffs seek to take more than that, they will have to make
6 a detailed showing in the form of a letter motion, after
7 conferring with defendants, that the additional deposition or
8 depositions are necessary. Second, again absent agreement of
9 the defendants or leave of Court, I will limit discovery to the
10 Departments of Commerce and Justice. As defendants' own
11 arguments make clear, materials from the Department of Justice
12 are likely to shed light on the motivations for Secretary
13 Ross's decision -- and were arguably constructively considered
14 by him insofar as he has cited the December 2017 letter as the
15 basis for his decision. At this stage, however, I am not
16 persuaded that discovery from other third parties would be
17 necessary or appropriate; to the extent that third parties may
18 have influenced Secretary Ross's decision, one would assume
19 that that influence would be evidenced in Commerce Department
20 materials and witnesses themselves. Further, to the extent
21 that plaintiffs would seek discovery from the White House,
22 including from current and former White House officials, it
23 would create "possible separation of powers issues." That is
24 from page 4 of the slip opinion in the Nielsen order. Third,
25 although I suspect there will be a strong case for allowing a

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1 deposition of Secretary Ross himself, I will defer that
2 question to another day. For one thing, I think it should be
3 the subject of briefing in and of itself. It raises a number
4 of thorny issues. For another, I'm inclined to think that
5 plaintiffs should take other depositions before deciding
6 whether they need or want to go down that road and bite off
7 that issue recognizing, among other things, that defendants
8 have raised the specter of appellate review in the event that I
9 did allow it. At the same time, I want to make sure that I
10 have enough time to decide the issue and to allow for the
11 possibility of appellate review without interfering with an
12 expeditious schedule. So on that issue I'd like you to meet
13 and confer with one another and discuss a timeline and a way of
14 raising the issue, that is to say, when it is both ripe but
15 also timely and would allow for an orderly resolution.

16 So with those limitations, I will allow plaintiffs to
17 engage in discovery beyond the record. Further, I will allow
18 for expert discovery. Expert testimony would seem to be
19 commonplace in cases of this sort. See, for example, Cuomo v.
20 Baldrige, 674 F.Supp. 1089 (S.D.N.Y. 1987). And as I indicated
21 in my colloquy with Ms. Vargas, I do not read Sierra v. United
22 States Army Corps of Engineers, 772 F.2d 1043 (2d Cir. 1985),
23 to "prohibit" expert discovery as defendants suggestion. That
24 case, in my view, speaks the deference that a court ultimately
25 owes the agency's own expert analyses, but it does not speak to

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1 the propriety of expert discovery, let alone clearly prohibit
2 such discovery, let alone do so in a case where, as I have just
3 done so, a finding of bad faith and a rebuttal of the
4 presumption of regularity are at issue.

5 That leaves only the question of timing. I recognize
6 that you proposed schedules without knowing the scope of
7 discovery that I would permit. I would like to set a schedule
8 today. In that regard, would briefly hear from both sides with
9 respect to the schedule. Alternatively, I could allow you to
10 meet and confer and propose a schedule in writing if you think
11 that that would be more helpful. Let me facilitate the
12 discussion by throwing out a proposed schedule which is based
13 in part on your letters and modifications that I've made to the
14 scope of discovery.

15 First, by July 16, I think defendants should produce
16 the complete record as well as a privilege log and initial
17 disclosures. I recognize that Rule 26(a)(1)(B)(i) exempts from
18 initial disclosure "an action for review on an administrative
19 record" but in light of my decision allowing extra-record
20 discovery I do not read that exception to apply.

21 Then I would propose that by September 7, plaintiffs
22 will disclose their expert reports.

23 By September 21, defendants will disclose their expert
24 reports, if any.

25 By October 1, plaintiffs will disclose any rebuttal

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1 expert reports.

2 And fact an expert discovery would close by
3 October 12, 2018.

4 Plaintiffs also propose that the parties would then be
5 ready for trial on October 31. My view is it's premature to
6 talk about having a trial. For one thing, it may well end up
7 making sense to proceed by way of summary judgment rather than
8 trial. For another thing, I don't know if we need to build in
9 time for Daubert motions or other pretrial motions that would
10 require more than 19 days to brief and for me to decide. I
11 would be inclined, instead, to schedule a status conference for
12 sometime in September to check in on where things stand, making
13 sure that things are proceeding apace and get a sense of what
14 is coming down the pike and decide how best to proceed. Having
15 said that, I think it would make sense for you guys to block
16 time in late October and November in the event that I do decide
17 a trial is warranted. Again, I am mindful that my word is not
18 likely to be the final one here and I want to make sure that
19 all sides have an adequate opportunity to seek whatever review
20 they would need to seek after a final decision.

21 So that's my ruling. You can respond to my proposed
22 schedule. I'd be inclined to set it today but if you think you
23 need additional time.

24 MR. FREEDMAN: Your Honor, John Freedman. Just one
25 clarification. I think it was clear from what you said but in

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1 terms of the number of depositions you meant ten collectively
2 between the two cases, not ten per case?

3 THE COURT: Correct. And they would be
4 cross-designated or cross-referenced in both cases. Correct.

5 MR. FREEDMAN: Understood, your Honor.

6 THE COURT: And, again, I don't mean to suggest that
7 you will get more, but that's not -- I did invite you to make a
8 showing with specificity for why additional depositions would
9 be needed. If it turns out that it is warranted, I'm prepared
10 to allow it but, mindful of the various principles at stake and
11 the limited scope of review under the APA, I think that it
12 makes sense to rein discovery in in a way that it wouldn't be a
13 standard civil action.

14 So, thoughts?

15 MR. COLANGELO: Your Honor, for the state and local
16 government plaintiffs, we have no concerns at all.

17 THE COURT: Microphone, please.

18 MR. COLANGELO: For the state and local government
19 plaintiffs, we have no concerns at all with the various
20 deadlines that the Court has set out. Thank you.

21 MR. FREEDMAN: Your Honor, for the NYIC plaintiffs we
22 concur. We think that it sets an appropriately expedited
23 schedule that will resolve the issues in time and we appreciate
24 the expedited consideration.

25 THE COURT: All right. Defendants.

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1 MS. BAILEY: Your Honor, I have a couple clarifying
2 questions. As far as the proposed July 16 deadline, you say
3 completing the record would that be the same deadline you
4 envision for the privilege log?

5 THE COURT: Yes.

6 MS. BAILEY: We would ask that the schedule we have
7 already set in other actions, that we have a little bit more
8 time for that initial deadline. We have a number of briefs and
9 an argument coming up that same week. Could we push that back
10 until a bit later in July?

11 THE COURT: And when you say "that," meaning the
12 deadline for initial disclosures, completing the record, and
13 the log or only a part of those?

14 MS. BAILEY: Yes, your Honor. All -- it would make
15 sense I think to do them all together. But it would -- we'd
16 like to move that a little later in July.

17 THE COURT: Well I don't want to move it too much
18 later in July because it will backup everything else. Why
19 don't I give you until July 23. I would imagine that that
20 would not materially affect the remainder of the schedule and
21 would give you an extra week. Next.

22 MS. BAILEY: Thank you, your Honor.

23 One other point. In the conference before Judge
24 Seeborg, Judge Seeborg, as your Honor is aware, he reserved the
25 issue of deciding whether discovery was warranted. But as I

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1 understand it, he strongly indicated that he thought that -- if
2 discovery is warranted in different actions, that the
3 plaintiffs should coordinate between those actions and asked
4 for the views of the parties on how that coordination should
5 take place. So he didn't ultimately rule on that but we agree
6 that coordinate between parties, if discovery is ordered in the
7 other cases, is warranted.

8 THE COURT: I agree wholeheartedly. And Judge Seeborg
9 knows as well, I did talk to him, as I mentioned. He indicated
10 that he had reserved judgment but indicated that he, I think,
11 would probably be ruling on or before August 10, I think; and
12 that it was his view that if discovery were to go forward, it
13 should be coordinated with discovery here if I were to allow
14 it.

15 I agree. Ultimately I don't see why any of the folks
16 who would be subjected to a deposition should be deposed twice
17 in multiple actions. How to accomplish that, I don't have a
18 settled idea on at the moment, but I would think that either
19 you all should go back to Judge Seeborg and say in light of
20 Judge Furman's decision we're prepared to proceed here or at
21 least enter some sort of stipulation in that action that would
22 allow for participation of counsel in the depositions -- I'm
23 open to suggestions. I mean I think that counsel in all of
24 these cases having a conversation and figuring out an orderly
25 way to proceed is probably sensible. I will call Judge Hazel

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1 but I imagine that all of the judges involved will be of the
2 view that depositions should only be taken once and certainly
3 if they are depositions of upper level officials those are
4 definitely only going to happen once. So I think coordination
5 is going to be necessary.

6 Another component of that is that I imagine there may
7 be discovery disputes in this case, and I don't have a
8 brilliant idea for how those get resolved, whether they get
9 resolved by me, by Judge Seeborg, or by Judge Hazel if
10 discovery is allowed there. I think for now they should come
11 to me because I'm the one and only judge who has ruled on the
12 issue. But in the event that the other judges do authorize
13 discovery, we probably need an orderly system to resolve those
14 issues. I don't want it to be like a child who goes to mom and
15 doesn't get the answer that he wants and then goes to dad for
16 reconsideration. So I think you all should give some thought
17 to that. Again, I don't think it needs to be resolved right
18 now because Judge Seeborg has reserved judgment on it, but I
19 will give it some thought, as I imagine he will, and we'll talk
20 about it.

21 Anything you all want to say on that score?

22 MR. COLANGELO: Your Honor, for the state and local
23 government plaintiffs, I would just add that we have no
24 objection to coordinating with plaintiffs in other cases on the
25 timing of depositions or on their participation, if warranted.

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1 Our key concern was in not having the latest decided case be
2 the right limiting step. We think the appropriate course is
3 the one you've taken. So assuming it's on the schedule that
4 your Honor has proposed, we have no objection to other -- to
5 coordinating with other plaintiffs on deposition schedules in
6 particular.

7 THE COURT: I don't intend to wait for the other
8 courts. I'm sure that they will be proceeding expeditiously in
9 their own cases, but I am trying to get this case resolved in a
10 timely fashion and in that regard don't plan to wait. So it
11 behooves all of you to get on the phone with one another and
12 figure out some sort of means of coordinating. You can look --
13 I have a coordination order in the GM MDL that might provide a
14 model and that allows for counsel in different cases to
15 participation in depositions. This is not an MDL but there are
16 some similarities. You may want to consider that. I'm sure
17 there are other contexts in which these issues have arisen and
18 you may want to look at models.

19 What I propose is why don't you submit a joint letter
20 to me from all counsel in these cases, let's say within two
21 weeks after you've had an opportunity to both confer with one
22 another and confer with counsel in the other cases, and submit
23 a joint letter to me with some sort of proposal. And if you
24 can agree upon an order that would apply and ensure smooth
25 coordination, all the better; and if not, you can tell me what

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1 your counterproposals are and I'll consider it at that time.

2 All right.

3 MS. BAILEY: Thank you, your Honor.

4 THE COURT: Very good. Anything else?

5 MR. COLANGELO: Nothing for us, your Honor.

6 THE COURT: I wanted to just give you one heads-up. I
7 noted from the states and local governments' letter there is an
8 attachment which is a letter with respect to the Touhy issues
9 in the case. As it happens, I have another case where that or
10 some of the issues raised in that letter are actually fully
11 submitted before me in an APA action case called Koopman v.
12 U.S. Department of Transportation, 18 CV 3460. That matter is
13 fully submitted. I can't and won't make any promises to you
14 with respect to when I will issue a decision in it but it may
15 speak to some of the issues raised in the states and local
16 governments' letter. So you may want to keep an eye out for
17 it.

18 With that --

19 MS. VARGAS: Your Honor, I do believe that we have --
20 we are not going to be resting on a former employee issue which
21 I believe is the issue in the Koopman litigation. So I don't
22 believe that will implicate the issues that are at play in that
23 case.

24 THE COURT: Good. Good to know. Thank you for
25 letting me know. Then you don't need to look for it unless you

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1 have some strange desire to read Judge Furman decisions.

2 On that score let me say I will try to issue a
3 decision on the motion to dismiss in short order. I don't want
4 to give myself a deadline. That's one prerogative of being in
5 my job. But I do hope that I'll get it out in the next couple
6 weeks. And it's been very helpful, the argument this morning
7 was very helpful, and counsel did an excellent job and your
8 briefing is quite good as well as the amicus briefing. So I
9 appreciate that. I will reserve judgment. I wish everybody a
10 very happy Fourth of July. We are adjourned.

11 (Adjourned)

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